

San Francisco Law Library


No. 43915-

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

1063
No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, F. C. MILLS and

E. H. MAYER,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MATT I. SULLIVAN,

THEO. J. ROCHE,

Special Assistants to the Attorney General.

Filed this day of November, 1915.

NOV 14 1915

FRANK D. MONCKTON, Clerk.

F. D. Monckton,
Clerk.

By Deputy Clerk.

INDEX.

	Page
Indictment	2
Result of Trial.....	4
Claim of Government.....	5
Positions Occupied by Defendants and Their Respective Duties	9
Distributive System	14
Photographs of the Locus in Quo.....	15
Folsom Street Dock, Bunkers and Connections.....	15
Off-Shore Bunker	16
In-Shore Bunker	17
Bunker Tracks	18
Scales-House on Folsom Street Dock.....	20
Government Weigher Facing West.....	21
Scales	27
Rods Connecting Platform Scales With Beam.....	28
Beam Located Over Platform Scale.....	29
Location of Hoppers.....	30
Destination of Cars and Distribution of Coal Controlled by Defendant Mayer.....	33
Lack of Sufficient Covering Over Bunkers.....	35
Purpose and Effect of Planking.....	37
Removal of Planking.....	37
Temporary Planking	38
Inaccessibility to Public.....	44
Mission Street Bunkers.....	45
Scales-House on Mission Street Dock.....	45
Exposed Condition of Scale Rods.....	46
Method Pursued in Weighing Imported Coal.....	46
Invoices of Foreign Coal Other Than That Imported From the Mines of the Western Fuel Company Correctly Represented the Weight of the Cargoes.....	49

	Page
Bills of Lading and Invoices of Coal Imported by Western Fuel Company From its Mines in British Columbia, Represented the Minimum Weight of Each Cargo.....	50
Bills of Lading and Invoices.....	51
The Weight of Coal Loaded into Ships at Nanaimo and Northfield Ascertained	52
Nanaimo Mine	53
Northfield Mine	60
Practice Showing Fraudulent Overloading of Coal....	63
Practice Not Confined to Northfield Cargoes.....	69
The Approximate Weight of Coal on Which the Western Fuel Company Failed to Pay Import Duties.....	70
Amount of General Percentage of Overage Great Deal in Excess of That Shown by Table "A".....	73
General Percentages Where Shortages Alone Considered	74
General Percentages Where Loading Weights Considered	75
Specific Instances of Shortages.....	76
Specific Instances of Fraudulent Conduct Disclosing Causes of Shortages	76
Discharge of Unweighed Coal into Bunkers.....	77
Short Weighing by Tubs.....	85
Interference With Scale Rod.....	88
Defective Condition of Platform Scales.....	89
Improper Use of Link.....	91
Discharge of Steamship "Wellington".....	93
Discharge of Steamship "Algoa".....	94
Import Duties Paid Upon Discharge Weight.....	95
Comparison of Existing Shortages Between Importations of Coal by Western Fuel Company and Other Importing Companies	96
Result of Discharge of Imported Coal, Incorrectly Stated	98
Branch of Case Relating to Fraudulent Draw-Back Claims and Fraudulent Conduct Committed in Furnishing Coal to Transports and Other Government Boats.....	100

Method of Coaling Ships.....	102
The Records of the Western Fuel Company Themselves Show Sales of Imported Coal Greatly in Excess of the Coal Received	104
Actual Overage After Taking Into Account Shortage Upon Importation	108
All Coal Deposited in Pockets of the Offshore Bunkers Was Accurately Weighed and its Poundage Known...	109
Exact Weight of Coal Loaded into Barges From Offshore Bunkers, Ascertained and Known to Defendants.....	115
Books Kept by Defendant Mills Demonstrate the True Weight of Coal Laden Upon Barges, and That the Weights of Coal Discharged From the Barges Were False and Fraudulent.....	122
Explanation of Entries Contained in Books Kept by Defendant Mills	123
Tables Disclosing Overages on Barges.....	133
Records of Barge Receipts and Deliveries, 1904-1905.....	137
Inaccuracies in Books Kept by Mills in No Way Affect Results	137
Net Results Shown by Records Kept by Defendant Mills..	139
General Average Immaterial—Specific Cases of Overage Controlling	140
Actual Weight of Coal on Barge Further Diminished and Actual Overage Increased by its Use as Fuel.....	143
Overages in Books Kept by Mills Indicates Cleanup of Barge	145
Logical Effect of Proof of Cleanups.....	153
Fraudulent Draw-Back Claims.....	154
Claim and Affidavit False, Respecting Importing Vessels..	160
Knowledge of Fraudulent Overages.....	163
Complaints by Engineers of the Pacific Mail Steamship Company Showing Shortage in Coal.....	166
Coal Furnished Gratis to Employees of the Pacific Mail Steamship Company, and Gifts of Cash Made.....	177
Coal Donated to the General Manager and Also to the Purchasing Agent of the Pacific Mail Steamship Com- pany	179

	Page
Scales and Method of Weighing.....	182
Taking Weights	185
Time Occupied in Weighing and Resultant Additional Time to Load Buckets.....	190
Weights Infrequently Taken.....	192
Lights at Night.....	197
Usual Location of Government Weigher.....	200
Ability of Shovelers to Perform Work Determined by Record Showing Out-turn Weight of Coal.....	203
Full Duty Not Performed by United States Weigher.....	206
Overages on Barges Due to Fraudulent Conduct in Filling With Heavy Coal the Weighed Tubs, While Those That Were Not Weighed Were but Partially Filled.....	211
The Powers Brothers	213
Cause of Averages.....	218
Mills Knew and Acquiesced in Practice.....	243
Steamship "Algoa"	247
Defendants' Failure to Produce Witnesses Having Knowl- edge of Facts.....	248
Expert Evidence	251
Complete Collapse of Defendants' Theory.....	261
Testimony of Other Coal Dealers.....	271
Responsibility of Defendant, James B. Smith.....	273

LAW OF THE CASE

I.	The Making of False Weights and False and Fraudulent Returns of Weights on Imported Coal and on Foreign Coal Furnished as Fuel to American Registered Vessels, Foreign Bound, Pursuant to a Conspiracy to Defraud the Government Out of Import Duties and to Obtain a Refund of Duties Claimed to Have Been Previously Paid, are Within the Scope and Purpose of the Indictment, Even Though Not the Result of the Fraudulent or Wrongful Manipulation of the Scales and Weights.....	278
	Lack of Merit Demonstrated.....	299
	Point Urged Cannot Now be Considered....	300
II.	The Discretion Exercised by the Lower Court in Denying Defendants' Motion for a New Trial, Cannot be Interfered With.....	301
	If the Order Denying a New Trial Were Reviewable, Nevertheless the Affidavits Failed to Disclose Any Reason for Interference by This Court.....	307
III.	The Evidence Conclusively Establishes the Guilt of all of the Defendants.....	313
	As to Plaintiff in Error, James B. Smith...	316
	As to Plaintiff in Error, F. C. Mills.....	319
	As to Plaintiff in Error, E. H. Mayer.....	320
IV.	There Was No Misconduct on the Part of Counsel for the Government During the Course of Their Argument	321
V.	No Error Committed During the Cross-Examination of Tidwell in the Respects Pointed Out....	324
VI.	No Error Committed in Ruling on the Testimony of Freund	326
VII.	The Lower Court Committed No Error During the Examination of Tidwell as a Witness for the Defense	327
VIII.	No Error Was Committed During the Examination of the Defendant Mills.....	328

No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, F. C. MILLS and
E. H. MAYER,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

On December 12, 1902, at San Francisco, California, the corporation known as the Western Fuel Company was incorporated (pp. 25-62). Shortly after its organization, it engaged in, and has ever since carried on the business of mining, importing, buying, selling, handling and dealing in fuel coals. The major portion of its business has always consisted in dealing in and handling foreign coals, most of which was mined by it at its coal mines located in and near Nanaimo, British Columbia, the remainder being acquired by purchase.

Nearly all of these foreign coals were imported into the United States at the harbor of San Fran-

cisco, and discharged either at San Francisco or at Oakland; upon infrequent occasions a cargo would be discharged at San Diego, and in one or two instances, at other ports located within the State of California.

INDICTMENT.

On February 27, 1913, the Federal Grand Jury, holding its session at San Francisco, returned an indictment against John L. Howard, James B. Smith, J. L. Schmitt, Robert Bruce, F. C. Mills, E. H. Mayer, Sidney V. Smith and Edward J. Smith, in which the individuals named were charged with having engaged in a conspiracy in the guise, and under the name, and through the medium of the Western Fuel Company, a corporation, for the purpose of defrauding the United States out of import duties on coal imported into the United States from foreign countries by said Western Fuel Company and others, to be accomplished:

1st. By fraudulent weights and false and fraudulent returns of weights.

2nd. By fraudulently weighing and causing to be weighed and reported to the United States, false weights on coal loaded from bunkers and barges of the Western Fuel Company, for fuel purposes, into American registered vessels plying between the United States and foreign countries.

3rd. By making, and causing to be made, false returns of weights and entries of coal shipped and

loaded aboard transports of the United States army service and other Government vessels.

In order to carry out such conspiracy, it was alleged that the defendants maintained on docks, wharves and barges owned by the Western Fuel Company, certain scales and weights which were fraudulently manipulated by them so that they would record weights of coal as desired by the defendants, but which were not the true weights thereof; that defendants pursued a method of weighing so that such scales recorded the weights desired by defendants, but not the true weights; that certain fraudulent affidavits and statements were made by defendants to officers of the United States and others and the Pacific Mail Steamship Company, a corporation, operating vessels registered under the United States laws, engaged in foreign trade and buying coal from said Western Fuel Company, for fuel purposes, to the end that said Pacific Mail Steamship Company should claim from the United States a greater rebate on the drawback of coal duties than the true weight thereof would permit, or what was actually due; and that defendants caused coal to be incorrectly weighed and measured on said scales for the purpose of permitting said Western Fuel Company to receive and make fraudulent profits and gains. It was further alleged that such conspiracy was in effect, operation and process of execution from January 1, 1904, to February 24, 1913 (pp. 5-16).

To this indictment, each of the defendants pleaded not guilty (p. 16). Thereafter a trial was had which commenced on December 9, 1913, and terminated shortly after midnight of February 17, 1914, at which time the verdict of the jury was returned.

RESULT OF TRIAL.

During the trial, the defendant, John L. Howard, died. The defendants, Joseph L. Schmitt, Robert Bruce and Sydney V. Smith were acquitted by the jury as the result of instructions given to it by the court. A verdict of not guilty was rendered as to defendant E. J. Smith. A verdict of guilty as charged was returned by the jury against the defendants, James B. Smith, F. H. Mills and Edward H. Mayer.

A motion for new trial made by the three defendants last named, having been denied, the defendant James B. Smith was ordered imprisoned in the penitentiary at San Quentin for the term of eighteen months and fined \$5,000; the defendant, F. C. Mills, was ordered imprisoned at the same penitentiary for the same period of time; and the defendant, E. H. Mayer was ordered imprisoned in the county jail at Alameda for the term of one year (Record, pp. 2503-6). From this judgment, the convicted defendants have prosecuted a writ of error to this court.

CLAIM OF GOVERNMENT.

The business carried on by the Western Fuel Company between January 1, 1906, and the date upon which the indictment above referred to was returned, was very extensive. In fact, so far as San Francisco and its vicinity was concerned, it practically enjoyed a monopoly. This is made clear by the testimony of D. C. Norcross, the secretary of the Western Fuel Company, who testified:

“During the year 1912 the following coal companies, in addition to the Western Fuel Company, were importers of coal in San Francisco: Hind, Rolph & Co., J. J. Moore & Co., Mitsue & Company and G. W. McNear. These companies simply purchased coal and brought it into the port here and sold it in cargo. Ordinarily they sold these cargoes to the Western Fuel Company. The Pacific Fuel Company in 1912 was selling imported coal to the dealers. It was the only company in San Francisco selling foreign coal to dealers outside of the Western Fuel Company in 1912 that I can think of. The volume of business done by the Pacific Fuel Company in imported coal is small in comparison with that done by the Western Fuel Company” (p. 182).

and other evidence with which the record is replete showing that nearly all foreign coal was discharged by this company.

A large part of the business transacted by the Western Fuel Company consisted of supplying to vessels plying between San Francisco and other ports, coal for fuel purposes. Among the vessels thus supplied with coal by the Western Fuel Company were liners carrying the American flag, plying

between San Francisco and foreign ports. For each ton of foreign coal upon which duty had been paid, delivered to these last mentioned vessels for fuel purposes, the company owning such vessel was entitled, upon furnishing to the government the necessary proofs, to a refund of the duty thus paid. During this same period of time the Western Fuel Company also supplied to the United States army transports and other Government boats large quantities of coal. The coal delivered to all vessels, both privately owned and belonging to the United States, would be weighed at the point of delivery to the vessel and, as the evidence disclosed, the drawback claims upon which such duties would be refunded by the Government, were based upon the records of such weights, upon which records would also be predicated and paid the bills presented for coal supplied to Government boats. And, while the Government is not interested in this phase of the situation, it may be proper in this connection to state that the companies owning the vessels coaled by the Western Fuel Company were required to and did pay for such coal upon the same weights as were made the basis of the drawback claims.

It is contended by the Government that large quantities of foreign coal were discharged at the wharves and bunkers of the Western Fuel Company upon which no duty was paid, and that to this extent the Government was defrauded out of moneys to which it was entitled, representing duties which should have been paid upon coal not weighed,

or incorrectly weighed. It also contends that in supplying coal for fuel purposes to vessels registered under the American flag, engaged in foreign trade, large quantities of coal were claimed to have been delivered to these vessels in excess of its actual weight, thereby defrauding the Government out of moneys refunded by it, supposed to represent duties paid upon this coal, to the extent to which the weights charged exceeded the true weights. It is further contended that large quantities of coal were claimed to have been supplied to transports and other Government boats in excess of its true weight, thereby defrauding the Government out of the price paid by it for coal not delivered, and in excess of its true weight.

That a conspiracy was entered into by the defendants for the purpose of perpetrating these frauds, and that the frauds were in fact committed, was absolutely demonstrated to a mathematical certainty by the evidence introduced.

At the threshold of this case, it may seem singular that this large corporation would engage in a conspiracy having for its purpose only the accomplishment of frauds against the United States Government, involving duties, drawbacks, and the price paid for coal furnished to Government vessels, in excess of the true weights. This, however, was but a small part of what was intended to be and what was in fact accomplished by the conspiracy and the fraudulent conduct resulting therefrom. When boats were chartered by the Western

Fuel Company to import coal into the United States (excepting when hired by the month), the charter price was paid, not upon the invoice or bill of lading weight, but upon the outturn weight (p. 182). When foreign coal was purchased by the Western Fuel Company from consignees by whom it was imported, the price paid to them for the coal was likewise paid upon the outturn, or discharge weight. When coal would be furnished to vessels for fuel purposes, the charges made and the prices paid therefor would be based upon the alleged weight of the coal at the point of delivery into the vessel, and when coal would be supplied to United States transports and other Government boats, the same method of charging would be pursued. While the Government may have been interested only to a limited extent in these fraudulent practices, the ultimate and final profit derived therefrom by the Western Fuel Company was tremendous. The extent to which it was assisted financially, and the profits resulting therefrom, can readily be imagined from the dividends paid from time to time, averaging approximately ten per cent. a year on the capital invested, and from a consideration of the statement made by its president, John L. Howard, to the stockholders, representing the condition of the company for the year 1910, in which he states:

“Total earnings of the company during the first eight years of operation \$2,463,608.26, from which total deductions for depreciation have been made amounting to \$283,640.18, leaving net profits, according to the books, of \$1,179,-

968.08, out of which dividends have been paid of \$614,627.50, or 62% on the capital stock.

“The mines were never in so good condition and have never before yielded their present yield, which exceeds 2,000 tons per day with one shift.”

United States Exhibit 103.

Aside from the conspiracy itself, which is established by both direct and circumstantial evidence, the case is divided into two great branches:

(a) Relating to and showing fraudulent shortages in cargoes at point of importation, and the consequent loss of import duties.

(b) Relating to and showing inaccurate, fraudulent and falsified weights of coal claimed to be delivered as fuel to foreign bound vessels carrying the American flag, and to transports and other Government boats, and the financial loss sustained by the United States.

These two phases of this controversy will be presented in the order in which they are stated, although they are both so intimately connected that many of the facts to which we will have occasion to presently refer will be applicable alike to both features of this case.

**POSITIONS OCCUPIED BY DEFENDANTS AND THEIR
RESPECTIVE DUTIES.**

The defendant, John L. Howard, had been the president of the corporation from the date of its

organization. His principal duties related to the management and operation of the mines owned by the Western Fuel Company which he visited two or three times a year. Among other things, he presided at the meetings of the board of directors and stockholders of the company, kept in touch and familiarized himself with the affairs of the company and prepared the annual financial statements of the company which were submitted from time to time to its directors and stockholders (pp. 110-111).

The defendant, James B. Smith, was, and at all times had been, the vice-president and general manager of the Western Fuel Company, exercising supervision and control over its business and properties excepting that he did not give his personal attention to the operation of the mines. As to the scope of his activities, David B. Norcross, testified:

“James B. Smith is vice-president and a very active vice-president. He is the manager of the business in California, has full charge of the bunkers, the employees here, and the selling of the coal here. He has complete charge of the entire business here and the employment and discharge of the help. He has charge, of course, of the receipt of the coal at this port. He has foremen and superintendents under him to attend to the details. He spends practically all of his time during working hours attending to the business of the Western Fuel Company. I believe that he visits the various properties of the company in San Francisco as the exigencies of the case require. * * * Mr. Smith, by examination of the records of the company, keeps himself in touch with the doings of the company” (pp. 110-111).

Upon this same subject the defendant, James B. Smith, testified:

“I am the active vice-president of the Western Fuel Company and might be termed its general manager. My duties include general office duties, the buying and selling of coal and general management to detail of the business. I have occupied this position with the company since its incorporation, December 15, 1902” (Test., p. 2154).

The defendant, Joseph L. Schmitt, had been a director of the company since the date of its organization and since 1906 had been its treasurer (p. 121).

The defendants, Robert Bruce and Sydney V. Smith, at different periods of time, had been directors of the company.

The defendant, F. C. Mills, from the date upon which the Western Fuel Company actively engaged in business, had been, and still was, the superintendent of its docks, boats and barges, having under his control all of the employees of the company engaged in this branch of its service. As to this, D. C. Norcross testified:

“The defendant, F. C. Mills, is superintendent of the docks. His superintendency includes all of the docks of the Western Fuel Company in San Francisco and dates from the incorporation of the company. Mr. Mills has also had the supervision of the barges and the crews upon the barges and of the employees upon the docks” (p. 122).

The defendant Mills himself testified:

“I am superintendent of the wharves and barges for the Western Fuel Company and have occupied that position ever since the company started,—January 1, 1903. * * * My duties for the Western Fuel Company are to keep the bunkers and yards in proper condition, to carry on the business keep the barges up, deliver coal from barges to steamers, discharge coal into barges, and also the yards and bunkers of the company” (p. 297).

There had also been delegated to the defendant, Mills, the right to employ and discharge men employed in that branch of the company's service over which he had control (p. 837).

The defendant, E. H. Mayer, was check clerk and weigher on the bunkers maintained by the Western Fuel Company and had occupied that position since the Western Fuel Company engaged in business. As to his occupation, Norcross testified:

“The defendant, E. H. Mayer, is check clerk and weigher on the bunkers, mostly on the Folsom Street bunkers. He has been in the employ of the company since January 1, 1904, and during all the intervening time has been employed in the capacity mentioned. His immediate superior is Mr. Mills” (p. 122).

Mayer himself testified:

“I am at present in the employ of the Western Fuel Company and have been for eleven years. * * * My duties in that capacity (check clerk) are to take the weights from the Custom House officers as they read the weights off the beam, and to distribute the coal” (p. 1985).

While ships were discharging foreign coal at the various docks maintained by the Western Fuel Company, the defendant, Mayer, on behalf of the Western Fuel Company, kept the weights of the coal being discharged, directed its distribution, and made and kept records showing the various places where such coal was distributed, and the weights thereof, both in tons and pounds; he also had under his immediate control and direction, the employees of the Western Fuel Company working upon the docks and wharves upon which coal was being discharged (Record, pp. 263; 696; 1035; 1063-4; 1280-1).

The exact character of the duties discharged by Mayer in this connection will be developed in greater detail later on in this brief.

The defendant, Edward J. Smith, had been employed as a checker and clerk upon the barges of the Western Fuel Company since January, 1910, checking the tubs of coal as they were weighed (pp. 122; 1984).

The secretary of Western Fuel Company was David C. Norcross, who had acted in that capacity since the first meeting of its board of directors (p. 104).

So that the court may appreciate the force of the testimony which was introduced on behalf of the Government, demonstrating the truth of the allegations of the indictment, in so far as they related to the convicted defendants, and so that it may

understand the manner in which the fraudulent conspiracy alleged, was carried out, and its purposes accomplished, it is essential to describe with some detail certain portions of the properties maintained by the defendant and the manner in which it transacted its business, so far as the importation, discharge and handling of foreign coals are concerned.

DISTRIBUTIVE SYSTEM.

The principal plant of the defendant, aside from its coal mines, was situate in San Francisco, California, at which place were located its office, its yards, its wharves and its bunkers, with the exception of a wharf and bunker known as the "Howard Bunkers", located at Oakland.

The only wharves in San Francisco at any time used by the Western Fuel Company in the importation of coal, were the Vallejo Street, Green Street, Howard Street, Mission Street and Folsom Street wharves. The Mission Street dock was the dock first used by the Western Fuel Company, it having taken possession of it on January 1, 1903. Its use was continued until some time in 1910-1911, when it was dismantled (p. 105).

The Folsom Street dock and bunkers were acquired by the defendant in July, 1904, since which date it has been continuously used by it (p. 105). It is with this dock and bunkers that we are principally concerned, because it was there that most of

the foreign coal was discharged. Upon this subject, the witness Norcross, secretary of the Western Fuel Company, testified:

“I would say roughly that 60 or 65% of the foreign coal imported by us into San Francisco was discharged at the Folsom Street dock or bunkers. The remaining portion of such foreign coal was discharged at Oakland or Mission Street wharf and at Vallejo Street. Not very much coal has been discharged at Vallejo or Mission Street, however, most of the coal not being discharged at Mission Street, being discharged at Oakland” (p. 106).

And again:

“The greater portion of our foreign coal is now and has been for years discharged at the Folsom Street bunkers” (p. 124).

The witness, David G. Powers, also testified:

“From 1908 until 1911 the Folsom Street dock was more frequently used for the discharge of foreign coal than any of the other docks” (p. 701).

PHOTOGRAPHS OF THE LOCUS IN QUO.

Attached to this brief in an appendix, are a number of photographs reproduced from some of the exhibits. Their examination by the court will greatly facilitate its labors in studying the record.

FOLSOM STREET DOCK, BUNKERS AND CONNECTIONS.

The Folsom Street wharf or dock was located at the intersection of Folsom Street and the Embarca-

dero in San Francisco, and projected in a northeasterly direction into the San Francisco Bay for a distance of 530 feet. The floor of the wharf was located about seven feet above the waters of the bay. Located upon this wharf was a superstructure consisting, among other things, of two bunkers. The top of these bunkers was 35 feet above the floor of the wharf. The aggregate length of both bunkers from northeast to southwest was 530 feet, extending practically from the shore line to the end of the wharf. Their width from northwest to southeast was 40 feet 9 inches (p. 63).

OFF-SHORE BUNKER.

For the purpose of convenience, when hereinafter referring to directions we will assume that the Folsom Street wharf and the bunkers located thereon, run in a northerly and southerly, instead of a northeasterly and southwesterly direction, and that the lines running at right angles thereto run in an easterly and westerly direction.

One of these bunkers was known as the off-shore bunker, occupying that portion of the superstructure extending in a westerly direction from the easterly end of the wharf for a distance of 230 feet. This bunker was divided into twenty-one compartments or pockets, each of which was designated by number and constituted a receptacle for the coal which from time to time, by means of a conveyor which was

moved from pocket to pocket, was checked into and laden upon barges and other boats. Each of these pockets or compartments, with the exception of the most easterly one, had a dip or slant in a southerly direction facing the waters of the bay. At the extreme easterly end of the bunker was a pocket which faced in that direction. Connected with this bunker and on the northerly side were three small pockets which dipped northerly and, as the evidence showed, were used for screenings. The width of each of these pockets other than those used for screenings, was approximately ten feet (p. 64; also United States Exhibit 1).

IN-SHORE BUNKER.

The in-shore bunker immediately adjoined the off-shore bunker on the west and ran in a westerly direction for a distance of 288 feet 6 inches. It contained five pockets, varying in width from 18 feet 6 inches to 130 feet. The dip or slant of these pockets was in a northerly direction. Connected with the bottom of the in-shore bunker and also facing northerly, were a number of chutes, by means of which the coal deposited in the in-shore bunker and its various compartments or pockets could be discharged. These chutes were located a short distance above the floor of the wharf itself, and were used for the purpose of discharging into wagons for local distribution (p. 65; see also, Defendants' Exhibit B. See Appendix.)

This superstructure, which contained the two bunkers already described, connected at its westerly end with a tramway or bridge, which extended westerly across the Embarcadero into and over the yards of the Western Fuel Company located on the westerly side of the Embarcadero (commonly known as East Street), in which was deposited from time to time a portion of the coal imported by it.

At the westerly end of the in-shore bunker was located the scales-house. Elevated a distance of about six and a half feet above the southerly side of the bunkers were two large parallel rails, known as the hopper track. This track extended over both bunkers, and was supported by uprights. Upon this track were located four large movable hoppers or towers on wheels into which the coal being removed from the vessel under discharge would be immediately dumped.

When a ship would be brought to the Folsom Street dock to be discharged she would be located immediately opposite the in-shore bunker. Each of these hoppers would be moved along the hopper tracks, so that a hopper would approximate each hatch of the vessel. The coal would then be taken out of the hold of the ship, brought up through its hatches in buckets, and dumped into these hoppers (p. 82).

BUNKER TRACKS.

Located upon the top of these two bunkers, paralleling each other and extending their whole length.

were three tracks, the gauge of which was three feet. On the northerly side of the bunkers was a walk or passageway, about four or four and a half feet wide, extending its whole length (p. 65). The distance between that walk and the north track was seven feet. The distance between the north track and the middle track was eight feet four inches. The distance between the middle track and the south track was four feet two inches. South of the south track was a board walk extending along the entire length of the bunkers. The distance between the south rail of the south track and this board walk was four feet one inch. The middle and southerly tracks were located under the hopper track and on the south side of the bunkers (pp. 65-66, United States Exhibits 1 and 2).

On account of the position of the vertical chutes descending from the bottom of the hoppers, the coal cars could be loaded with coal only when standing upon the south track. The northerly track was located between the hoppers and the northerly side of the bunkers. This track and the middle track were used for switching purposes and to distribute coal at various points along the bunkers into the pockets or compartments below (p. 1044).

These three tracks extended from the easterly end of the off-shore bunker and over the in-shore bunker in a westerly direction past the scales-house, converging on the tramway extending to the company's yard. The middle and south tracks passed

the scales-house on its south; the northerly track passed it on its north.

SCALES HOUSE ON FOLSOM STREET DOCK.

About 10 feet 8 inches westerly of the westerly end of the in-shore bunker and near the point of intersection between the westerly line of the Embarcadero and the Folsom Street dock was located the scales-house in which were contained the scales upon which the imported coal discharged at Folsom Street dock was weighed. The floor of the scales-house was elevated above the level of the top of the bunkers, on one side 6 feet 5 inches, and on the other, 7 feet 1 inch (pp. 67; 74). Its dimensions were 8 feet by 7 feet, its length running north and south (p. 99; see also photographs, United States Exhibit 5).

The scales-house contained three windows, one facing north, another south and the third west. Access to the scales-house was gained by stairs which led to a door, facing east, containing glass panels (p. 89).

In this scales-house were two scale beams connecting with the platform scales, resting on the top of the bunker. By means of these beams discharged coal would be weighed, and the weight of the coal would be determined by the weighers. These beams, extending north and south, were located on the extreme west side of the scales-house. They were so close to the west wall of this enclosure that it was

impossible for a weigher to locate himself between the wall and the beams (United States Exhibit 12).

As to this matter Mr. Thomas H. Selvage, assistant United States District Attorney testified:

“I am familiar with the scale-house located above the dock immediately above the scales connected with the north and south tracks respectively. I have been inside said scale-house. We took two photographs of the interior of the scale-house. There were two scales beams therein. Those beams were located on the west side of the house. * * * The scale beams are up against the side of the scale-house as I remember it, so that there is no space in which a person can locate himself between the scales beams and said west side of the house and take weights, looking in an easterly direction down the tracks or toward the hoppers; * * *” (pp. 92-3).

GOVERNMENT WEIGHER FACING WEST.

As has already been shown, all activities connected with the discharge of foreign coal at the Folsom Street dock, from the very moment that it left the hold of the ship from which it was discharged until it reached its ultimate point of distribution from the bunkers with the exception of that portion of this coal which, after being weighed, was carried across the tramway and deposited in the company's yard on the west side of the Embarcadero, and excepting the weighing of the coal itself, took place east of the location of the scales-house. If coal were being discharged directly from the hoppers into the in-shore bunkers, or if coal cars were filled

to such an extent that the coal would roll over their tops and into the bunkers below, or if the sides of the cars were to be opened to discharge coal into the bunkers below before it was weighed, all matters in which, of course, the Government was interested, and which practices as revealed by the evidence were frequently indulged in, the position of the United States weigher in the scales-house was such that none of these things could possibly come under his observation.

As to this peculiar and significant situation, the testimony is without conflict.

The witness Selvage testified:

“That is to say, the person taking the weights must face around with his back immediately toward the dock and hoppers and toward the place where the coal is being loaded into the cars” (p. 93).

Special agent, W. H. Tidwell, who visited the scales-house while a ship was being discharged, described the situation as follows:

“The discharge of the coal from the hoppers themselves could not be seen from my position. The United States weigher was at the scales upon the occasion of my visit. He was facing west, with the beam of the scales in front of him, and with his back toward the hopper and the bunker” (p. 305).

W. J. Dougherty, chief weigher for the Government, testified:

“The weigher at the scales-house faces, as near as my judgment is, towards the west, with his back toward the operations on the dock.”

David G. Powers, another witness for the Government, testified:

“At Folsom Street the scale-house was located on the westerly side of the dock, and the weigher faced in the westerly direction with his back toward the operations” (p. 703).

Aside from this inexplicable peculiarity, the very circumstance that the scales-house was raised above the top of the bunkers, itself prevented the Government representative engaged in weighing coal to view to any considerable extent the operations surrounding the discharge of coal, even though he had been, as he should have been, facing in an easterly direction towards, instead of from, the dock.

That the exact location of the cars being weighed upon the southerly platform scales, whether or no there was anything interfering with the taking of a proper weight, or what effect, if any, the beam hereafter referred to had upon the coal located upon these cars, or what, if anything, became of such coal, could not be observed by and could not be known to the Government weigher in the scales-house, is also made clear from the evidence.

As to this the witness Selvage testified:

“From the position the weighers would occupy I was unable to see either the platforms of the scales or the chutes beneath the hopper. I could see a very short distance on the track looking easterly. The weigher could not get that view without getting up and changing his position. Having gotten up and looking out through the south window, he could see a por-

tion of the platform upon which the train rested at the time it would be weighed.

* * * * *

If you stood up where the chairs were, where the weigher is situated, you could not see those objects. * * * The chair in which the weigher sits is quite a little distance from the south window. The scales are more to the north side than to the south side. Even a small man could reach the south window from the chair by one step, having reached the window he could see a portion of the cars on the platform" (pp. 98-99).

As already stated, the four hoppers into which the coal was primarily discharged, were located over the in-shore bunker. The first of these hoppers, approximating the forward hatch of the ship being discharged, would be spotted in the neighborhood of forty or fifty feet from the scales-house. Each hopper being directly beyond the other upon the same track, the first hopper, of course, interrupted the view of one looking in an easterly direction from the scales-house, and prevented any of the succeeding hoppers being observed. In fact, even though no cars were located under the first hopper, the elevation of the scales-house would prevent that portion of the in-shore bunker located under any of the remaining hoppers, being seen. Even when cars were located under the first hopper, for the reasons already given, it was not possible for one standing in the scales-house looking east, to see the mouth of the chutes connected with the bottom of the first hopper through which coal was being discharged

into the cars below. As to this situation there is no conflict in the evidence.

To this point the witness Selvage testified:

“There is a window immediately to the south of the door on the east side of the scale-house and facing the dock and coal hoppers. I recall looking out of that window to ascertain whether one could see the scale platform from the scales-room, and I could not see it. A weigher in the scale-house facing the east instead of the west and looking through the easterly window would not be able to see beyond the first hopper. I could not see the track beneath the first hopper. I do not recall seeing any cars stationed at any time under the first hopper while I was in the scale-house. It would not be possible for a person standing in the scale-house and looking in an easterly direction to see the mouth of either one of the two chutes emerging from the bottom of the first coal-hopper, or to see the coal being dropped through the mouth of either of those chutes into a car beneath said first hopper, or to see what was being done under any of the other three hoppers” (pp. 93-4; see also photograph, United States Exhibit No. 20).

The witness Dougherty corroborated Selvage and said:

“If he (the weigher) were to turn around, during the rapidly moving operations on the bunkers, he could, from his station in the scales-house, not see much of anything. He could see the westerly side of a hopper, but he could not see the coal coming up; he could see part of one car that is being loaded from the hopper nearest to the west. I do not think, however, that he could see the coal actually being discharged even into the first car. * * * If the weigher turned around he could not then see the coal

discharged from the first hopper into the cars located underneath the hopper. He could only see part of the car. He could not see the entire operation. My impression is that he could not see the chutes protruding down from the bottom of the first hopper. The weigher from his position in the scales-house cannot see the position of the cars upon the scales. The space between the top of the coal-cars and the bottom of the hoppers is not very great" (pp. 356-7). * * *

"This photograph (United States Exhibit No. 7) represents just about what you can see by looking out of that window where there is no coal-car underneath that first hopper. * * *

If the weigher were to get up and go to the window he could not see beyond the first hopper for any material distance" (pp. 357-8).

Special Agent Tidwell, who visited the docks while ships were being discharged, testified:

"On the occasion that I have referred to, when I was in the scales-house when they were discharging a vessel, the first hopper was 40 or 50 feet from the scales-house. I do not recall whether coal was then actually being discharged through the chute from the bottom of the first hopper into the cars, but coal was actually being discharged from several towers at that particular time. I could see practically nothing except probably the bottom of the cars or the walls of the cars under the first hopper. So far as the chutes were concerned, it was impossible to see them from the scales-house. The discharge of the coal from the hoppers themselves could not be seen from my position. The United States weigher was at the scales upon the occasion of my visit. *He was facing west with the beam of the scales in front of him and with his back toward the hopper and the bunker.*"

SCALES.

On each side of the scales-house was located a large platform scales. The southerly track already referred to ran along and over the southerly platform. The northerly track, which passed the scales-house on the north, ran over the northerly platform connecting with the other two tracks west of the scales-house and just east of the tramway (see United States Exhibits 4, 5, 16, 17, 18 and 159; Defendants' Exhibits D, G and H).

These scales were what is known as the Fairbanks-Morse type. Their component parts and the manner in which they were connected with the beams located in the scales house were described by the witness, Tietjen, called on behalf of the defense (pp. 1377 et seq.). The southerly platform was the one ordinarily used for the purpose of weighing the cars loaded with coal. After the loaded cars were weighed, they would proceed westerly a short distance, then continue on their journey, taking the coal over to the yard, if it was to be distributed there; otherwise they would switch back upon the northerly track running along the bunkers and dropping the coal into the pockets of either the in-shore or off-shore bunkers, following the directions of the defendant, Mayer (pp. 262-5; 694-5).

These scales had a capacity of 25,000 pounds (p. 1986). The beams located in the scales-house are described by the witness Moynihan (pp. 291-2), have already been referred to, and are reproduced in

some of the photographs introduced in evidence (United States Exhibits 12 and 13).

RODS CONNECTING PLATFORM SCALES WITH BEAM.

Running along on each side of the north upright supporting the scales-house, through the floor of the scales-house and connecting with the scales beams were two rods. These rods were unprotected in any way and completely exposed. These rods are thus described by the witness Donegan:

“Last Saturday I examined the structure immediately underneath the scale-house and between its floor and the tracks. There are two rods there exposed for a distance of 9 feet which descend from the floor of the scale-house to the floor of the bunker (p. 72).

* * * * *

(Pointing out on Defendants' Exhibit 'F' two rods, one upon either side of the north upright which apparently supports the scale-house, the witness here said that these two rods were the rods connecting with the beams in the scale-house.) I did not notice a covering of any kind upon either of these rods” (p. 85).

That the maintenance of these rods in the manner indicated is clearly improper was shown by defendants' witness, Tietjen, who testifying to the usual practice of protecting scales rods, said:

“Sometimes the rods of the scales are thus boxed and sometimes they are not. The box at times gets knocked off. The general way, however, is to box the rod in. *I think it should be covered in. It is bad construction to have it exposed*” (p. 1398).

And, as indicating the reason why it was essential to box in or protect these rods, the same witness testified:

“Q. What is the effect of the pressure of one’s foot against the beam-rod?

A. The minute you put your foot against the beamrod it will stop the scale from weighing. It is really hard to tell how much pressure, it is according to how hard you put your foot against it.

Q. A slight pressure might make quite a difference in weight?

A. Yes, maybe 100 or 200 lbs.

Q. That is, the mere pressure of the sole of the foot against the beam-rod would make a difference of several hundred lbs., would it not?

A. Yes, probably 500 lbs.” (p. 1392).

And again,

“The extent to which the weighing is affected by pressure against the scale-rod depends altogether on the amount of pressure. A slight pressure would affect the scales a whole lot; that it is, the sensitive part of the scale. A very slight pressure would affect the scales slightly; a very heavy pressure would affect them considerably” (p. 1396).

In fact, the testimony shows that a strong wind blowing against these unprotected rods would itself affect the accuracy of each weight taken to the extent of 50 or 100 lbs. in favor of the Western Fuel Company.

BEAM LOCATED OVER PLATFORM SCALE.

Between the south side of the scales-house and the southerly side of the superstructure was lo-

cated a large wooden beam or girder extending north and south which assists in the support of the scales-house. The thickness of this beam was 12" x 6" (pp. 71, 74). This beam, at a point immediately above the center of the southerly track, running along the southerly scale platform, had the appearance of being roughed up or chewed out for about an inch and a half (pp. 72, 83). This portion of the beam was weather beaten, indicating that the condition described was not of recent origin. As will be subsequently shown, its condition was caused by contact with coal with which the cars would be overloaded, which coal would be knocked off the cars on to the ground and shoveled into the bunkers below without being weighed. The height of the coal cars, above the rails, was 5 feet 10 inches. The distance between the top of the car and the horizontal beam just mentioned was 1 foot 2 inches (p. 74; see also photograph, United States Exhibit 5).

Location of Hoppers.

The hoppers into which the coal would be directly discharged from the ship, were always located over the in-shore bunker. None was ever placed over the off-shore bunker. This fact is of the utmost importance in this case because, as we will hereafter show, the coal that was not weighed was invariably permitted to drop into the in-shore bunker, while the coal that was deposited into the pockets of the off-shore bunker went first upon the scales and was weighed, thereby enabling the officials of the West-

ern Fuel Company to know almost to a pound the exact weight of the coal contained in the offshore bunker. Upon this point the witness, Joseph Waterdoll, testified:

“These hoppers or towers into which the coal would be discharged, would practically always be located over the inshore bunker” (p. 1035).

The reason for this is described by Norcross, who stated:

“The ship is ordinarily discharging toward the inshore bunker. If we had a vessel at the other end, the barge could not get in so as to draw up to the offshore bunker. The hoppers are located over the inshore bunker, so if any coal should by any possibility or through any inadvertence fall and locate itself in the cars as the coal is being dumped from the hoppers into the cars, or fall over the sides of the cars, it would not fall into the offshore bunker because there are boards there to keep it from falling anywhere except on the floor. The coal could not fall into the offshore bunker at the time of discharging, because the offshore bunker is at the other end of the bunker. The coal which finally finds its way to the offshore bunker has already been on the scales and has been weighed” (pp. 245-246).

Connected with each of the four hoppers already described are four chutes, two descending in a northerly direction toward the northerly track, and the remaining two chutes descending in a southerly direction from the bottom of each hopper, coming to a termination immediately above the center of the southerly track (pp. 68, 73, 87). Two cars loaded with coal from a hopper would be weighed

at one time. The weight of these two cars was about 9000 lbs. When loaded with coal, the gross weight of coal and cars would be approximately 20,000 lbs. or five long tons.

According to the testimony, these latter two chutes located underneath the hopper were the only chutes through which coal was discharged into the cars (p. 82). The discharge of coal through each of these chutes into the cars below would be controlled by a gate operated by hydraulic power (p. 1035). It frequently occurred that the gate could not be closed while coal was discharging, the result being that the car would be overflowed, the coal running down from the overloaded car into the bunkers below (pp. 1035-6).

Ordinarily when a vessel was being discharged, two trains would be used by the Western Fuel Company in relieving the hoppers and distributing the coal. Each of these trains consisted of four cars and a controller or motor, the propelling power being electricity applied by means of a third rail, which was installed about three or four months after the bunkers were acquired by the Western Fuel Company, until which time an overhead trolley was used (pp. 1034, 1037).

At first, each of these trains was operated by two men. This system was changed and the control given to one man, who, while the train was operated, located himself between the second and third cars (p. 1037).

The body of coal cars used upon these bunkers when the cars were closed was shaped like the letter

“V”. When the train would reach the point where it was desired to discharge the coal, a rope connected with the bottom of the sides of the car would be pulled, thereby causing the sides of the car to open and hang perpendicularly, thus allowing the coal to drop into the bunkers below (pp. 1036, 1064). When four hoppers were being operated, as is customary, each of these trains would handle two hoppers, one hoppers 1 and 3; the other, hoppers 2 and 4 (Test. Griffin, p. 1064). With the exception of occasions, to which reference will hereafter be made, trains, when loaded, would carry the coal to the scales-house where they would be weighed, two cars at a time, on the south scale platform. After being weighed the train would be run for a short distance in a westerly direction, returning when the coal was to be discharged in the bunkers on the north side of the scale-house over the north scale platform, and along the northerly track until it reached its destination (p. 1044). After unloading, by means of switches the train would again reach the southerly track and relocate itself under the hopper from which it was intended to take coal.

**Destination of Cars and Distribution of Coal Controlled by
Defendant Mayer.**

That defendant Mayer was the directing mind so far as operations on the bunkers were concerned, cannot be disputed. The witness Waterdoll, who operated one of the coal trains, testified:

“I know the defendant, Eddie Mayer, and have known him ever since he came in contact with the Western Fuel people on the Folsom Street bunkers. * * * He was a boss

up there; he was boss and weigher, both. He was my boss, and he was boss of the other motormen employed by the Western Fuel Company and all the men working upstairs, except the engineer. He gave instructions and directions to the men. * * * When coal was discharged into these cars and brought over to the scales and weighed, it would sometimes be carried to the pockets of the offshore bunkers and sometimes to the yard pockets. I got my instructions where to discharge coal from Mr. Mayer. He would indicate to me which particular pocket of the offshore bunker to put the coal in. I would follow the instructions given me by Mr. Mayer (pp. 1034-5). * * *

I received instructions from the defendant Mayer to dump a car into the bunkers before it would reach the scales (p. 1038).

* * * * *

At the request of Mr. Mayer I discharged a train load of coal into one of the pockets or compartments of the inshore bunkers without bringing it on the scales (p. 1039)."

The witness, Samuel Griffin, who at times was also employed operating one of these coal trains, gave like testimony. He stated:

"My immediate boss when I was working for the Western Fuel Company was Eddie Mayer" (p. 1064).

* * * * *

I received instructions from the defendant Mayer regarding the operation of this motor on the trains, and regarding the discharge of coal" (p. 1065).

As to the capacity of Mayer, the witness, G. L. Hahn, Assistant Weigher on the Folsom Street bunkers, testified:

“Mr. Mayer is one of the weighers on the Folsom Street dock. I guess he does most of the weighing for the Western Fuel Company” (p. 263).

See also Test. of David Powers (pp. 694-97); Test. of Edward H. Mayer (pp. 2001-2).

LACK OF SUFFICIENT COVERING OVER BUNKERS.

One of the claims urged by the Government and conclusively established by the evidence was that coal was not only permitted to be discharged, but was, by some of defendant's employees, acting under positive and explicit instructions of the defendant, Mayer, deliberately discharged into the pockets of the in-shore bunker without being weighed. This was accomplished in a number of ways. At times the cars would be filled to overflowing, the surplus coal dropping down its sides and into the bunkers below, and other times the sides of the cars would be opened, thereby enabling the coal to fall from the cars into the bunkers, and upon other occasions, in the absence of cars, the hopper chutes would be opened, thereby permitting the coal to drop directly down below the tracks. It is obvious that if the top of the in-shore bunker had been planked or deeked, this situation could not have existed.

The Folsom Street bunkers were acquired by the Western Fuel Company in July, 1904, from the Dunsmuir (p. 224), who, prior to that time, had been engaged in the wholesale coal business in San Francisco. While being used by them, both the

off-shore and in-shore bunkers were entirely covered and decked. The witness Samuel Griffin, who had been employed from time to time by the Dunsmuirs as an operator of one of these coal trains, testified:

“I would be employed by the Dunsmuirs every time a steamer came in. I was running a motor. The bunkers were then planked and were so planked during the entire time of my employment with the Dunsmuirs. There were then three tracks on top of the bunkers during the entire time I worked for the Dunsmuirs.

* * *

When the Western Fuel Company took charge, there was a kind of plank, I guess about four feet wide on the tracks, for the coal coming out of the hopper, that was supposed to save the coal from going into the bunkers, and it was this planking over the bunkers, of which I have spoken, was taken out altogether. I could not say just when that was done, but I know it was considerably after the Dunsmuirs left the place” (p. 1063).

Upon this same subject the witness Waterdoll testified:

“The runway on the bunkers, of which I have spoken, was maintained by the Dunsmuir people. When the Western Fuel Company took over the bunkers they took up the plans to make more room for coal. Previously there had been planking on the inside of the bunker. I am familiar with the location of the tracks on top of the bunkers. The bunkers were floored on the inside and underneath the hoppers in the time of the Dunsmuirs. That was a solid flooring” (pp. 1033-4).

PURPOSE AND EFFECT OF PLANKING.

The result of this planking was that when coal dropped down from the sides of the cars or fell from the chutes, it would be prevented from going into the bunkers below and could readily be shoveled into the cars so as to enable it to be weighed. This made manifest by the testimony of the witness Waterdoll, who said:

“Before the decking or flooring was removed, if coal dropped down from the sides of the cars, as the cars were being loaded, it would lie on the platform” (p. 1034).

Griffin also testified:

“When the Dunsmuirs were there, if coal dropped down on top of the bunker, it could not go below; but after the Western Fuel Company took up the flooring, if coal would drop down it would go down into the bunker” (p. 1063).

 REMOVAL OF PLANKING.

Almost immediately after the Western Fuel Company acquired the bunkers, this planking was removed, with the exception of that portion extending to a point 10 feet 8 inches east of the scales-house (p. 74). The witness Waterdoll testified:

“After the Western Fuel Company took possession of the bunkers, *they took away this permanent decking or flooring to which I have referred. They took it away, and left the top of the bunkers open.* * * * The Western Fuel Company continued to use the overhead trolley during a period of four months; then they resorted to the middle rail. *The planking had been taken up, however, before the third rail was installed*” (p. 1034).

And Griffin, from whom we have already quoted, corroborated this testimony in stating:

“But after the Western Fuel Company took up the flooring, if coal would drop down, it would go down into the bunkers” (p. 1066).

This evidence thus given by the witnesses Waterdell and Griffin, was not contradicted. It therefore stands as an undisputed fact in this case.

TEMPORARY PLANKING.

Some time later, in response to complaints made to Collector of Port Stratton that inexplicable shortages had occurred in the discharge of foreign coal at the Folsom Street dock, an order was issued by the collector requiring the Western Fuel Company to provide covering for the inshore bunker in the vicinity of hoppers that were being used to discharge coal. Accordingly, it was arranged that while a ship was being discharged, temporary planking should be laid underneath and in the immediate vicinity of the hoppers being used. For this purpose a number of planks were cleated together, which would cover portions of the inshore bunker, and the position of which could be changed from time to time, corresponding with the location of the hoppers which, of course would have to be changed to accommodate them to the position of the ship's hatches. According to the contention of the Government, established by a mass of evidence, this temporary planking was but seldom

used, frequently laid only when the presence of Government inspectors was known or anticipated.

For the purpose of familiarizing themselves with the Folsom Street dock and the manner in which coal was discharged, several visits were made to the bunkers by Mr. Selvage, Assistant United States District Attorney; Mr. Tidwell, Special Agent, and others. With respect to this temporary planking Mr. Selvage testified:

“I do not recall any temporary flooring or decking over the inshore bunker between the middle track and the south track until you get pretty well west over said bunker. I was then familiar and am now familiar with that part of the dock located between the south rail of the south track and the extreme south side of the dock, and the condition of that part of the dock when the photographs were taken was just the same as is shown in this photograph ‘United States Exhibit Number 16’ for identification, that is, there was no covering at all over the offshore bunkers and there were some planks resting up against the wall on the inshore bunkers. Some of the bunkers were not covered at all and some of the planks over the bunkers that were covered were elevated somewhat upon the coal beneath them.

(A photograph marked ‘United States Exhibit Number 17’ for identification was here shown the witness.) Portions of the portable flooring or decking were resting up against the extreme south side of the dock at the time when the photograph was taken, as is shown in this photograph” (pp. 90-91).

Again referring to photograph, United States Exhibit Number 19, the witness testified:

“The flooring provided for the space, appearing in the photograph between the south rail of the south track and the extreme south side of the bunker or dock, was mostly laid up against the wall” (p. 92).

And again, on cross-examination, he states:

“I think it very possible that I did observe it at the time,—that is to say, I think it possible I did observe whether or not the boards were out of place while the ship was unloading. My understanding was that these boards were intended to be used to cover different points at different times, since, according to my observation, *there were not boards enough to cover all the space at once*. I refer now to that portion of the bunker occupied by the hoppers at the time my photographs were taken, and to the space between the southerly track and the middle track and between the southerly track and the bulkhead. I think there were probably boards enough to cover two-thirds of the space—that is to say, the space between the two railroads and the southerly road and the bulkhead. I am referring, of course, to the space over the inshore bunkers because there were no coverings whatsoever for the offshore bunkers. Some of the boards were leaning up against the bulkhead and some of them were lying upon the spaces, partly covered—that is, the space would be partly covered but not altogether; but there were not sufficient planks there to cover all of the spaces. * * * I am positive that there were not boards enough to cover all the spaces under all four hoppers. I did not count the boards. But I could see all the boards that were there and there were spaces still uncovered and some of them were leaning against the walls, which, if they had been turned down, they would have covered certain spaces, but there were not sufficient boards to cover the

balance of the spaces. I had no difficulty, however, in seeing that there were not boards enough to cover the space between all four hoppers. I took a flashlight picture of that" (pp. 96-7-8).

The witness Donegan testified:

"Upon one or more of these occasions when I visited the bunkers for the purpose of making measurements, I noticed some of the temporary planking located between the off or south tracks, and the extreme south side of the bunker upon and leaning against the side of the bunker.

* * * * *

I observe upon the photograph marked Defendants' Exhibit 'H' that some of the portable planking has been taken up and is leaning against the side of the last described wall, but when I was actually down there on the wharf the planking was pretty much down and only partially up. I did not testify a few minutes ago that on one or more of the occasions when I was on the dock I saw portions of the decking between the south track and the south wall open and leading against the coal. What I said was that they were partially up leaning on top of chunks of coal, that is to say, the chunks were underneath and prevented the planks from dropping into place. I do not know how the chunks of coal got under this portable planking. I think coal was being discharged at the docks on almost every occasion when I visited said docks" (p. 86).

"There is partial planking between the rails in each one of these tracks—that is to say, there is at some points a firm spike planking and at other points a movable planking which can be taken out. The space between the north track and the middle track from the south rail of the north track to the north rail of the mid-

dle track was open when I visited the docks and not planked at all. That is true of the entire dock extending from the westerly to the easterly end of the dock for a distance of 530 feet, except for a very small space, and the only interruption to the open space there consists of the girders running from one side of the dock to the other. The space between the middle track numbered Track 2 and the south track is open for the entire length except where the ties cross the switches. * * * The distance between the south rail of the middle track and the north rail of the south track and the north rail of the south track is four feet center to center of rail and is open except for a foot that you have to take off for the cap. * * *

The space between the southerly rail of the south track and the southerly side of that dock was closed or covered by movable planking for part of the distance and open for part of the distance. This space is two feet six inches wide" (pp. 66-7).

And again,

"Referring to the space shown in United States Exhibit Number 1 between the middle track and the south track from the westerly end of the offshore bunker to a point about 10 or 15 feet east of the scales, I will say that the space was open the day I was there. I won't say the space was entirely open, but it was here and there planked, a piece perhaps 3 or 4 feet long. I didn't observe its condition except on that particular day. Mr. Tidwell called my attention to it then. On that date the space was open.

Q. Was the space entirely open, or was it closed at intervals by the use of the temporary planking or decking?

A. There was occasional planks" (pp. 83-4).

The witness Tidwell, who visited the bunkers while a ship was discharging, describes what he observed, as follows:

“As I remember it, speaking of the time when a ship was being discharged, the entire inshore bunker under which the north track passes was entirely open, in respect to the space between the two tracks. There was a beam on which rested the hopper, and on the both sides of this beam everything was open. The second track was also open. I mean by the second track the middle track. The third track, and I believe also part of second or middle track on the west side of the bunkers, were covered over partially. There was also a covering on the south side of the third track. There were a number of movable planks there, which were standing up against the south wall of the bunkers, which had not been put in place” (p. 305).

And according to David Powers:

“At Folsom Street there were only a few boards under the hoppers so that the coal would drop down below into the inshore bunkers, the chutes leading from the hoppers were opened or closed by the men in charge of the coal cars” (p. 711).

Griffin recognized that frequently the planks would be missing when coal was being discharged, saying:

“I recall an occasion when temporary planks were placed around the hopper but they were not always there. When they were taken up, they would be placed alongside the hoppers” (p. 1064).

* * * * *

"I suppose the planks would be placed underneath the hoppers whenever a steamer came in. Sometimes, however, they would not do that" (p. 1066).

* * * * *

"The planking is placed down, I suppose, to save the coal from going into the bunkers. I stated that sometimes they forgot to put the planking down" (pp. 1069-70).

According to this witness and others, the existence of these planks availed nothing because even upon occasions when they were utilized, the coal falling upon them would be shovelled down into the bunkers below.

According to Waterdoll, this temporary decking would be taken out at various times during the process of discharging a ship in order to make more room so they could dump underneath the hoppers (p. 1039).

See also testimony of David G. Powers (p. 696) and Edward Powers (p. 868).

INACCESSABILITY TO PUBLIC.

The bunkers where these operations were being conducted were reached by a very long steep stairway located upon its north side. This stairway led to a door over which was a sign "No Admittance" and which was kept locked. To these bunkers the general public were not admitted (p. 123).

While these bunkers could be reached by two other methods, neither one could be taken advantage

of by the public. One consisted of a stairway leading from below the bunkers over near the screening shed, which was enclosed by a fence (p. 85). The other was over the bridge or tramway from the company's yard.

MISSION STREET BUNKERS.

Those portions of the record already referred to disclose that but little foreign coal was discharged excepting at the Folsom Street wharf. So far as the importation of coal was concerned, most of the evidence introduced by both the Government and the defendants centered around the Folsom Street bunkers. It is therefore unnecessary to describe in detail the operations resulting in the discharge of vessels at any other place. From time to time they were touched upon by the evidence, principally, however, in connection with evidence showing specific instances of fraud. We desire, however, to direct the court's attention to one significant fact connected with the Mission Street bunkers.

Scales-House on Mission Street Dock.

The Western Fuel Company went into possession of the Mission Street dock Number 2 on January 1, 1903, and continued to use it until some time in 1910 or 1911 (p. 105). The bunkers which were located upon this dock were removed in 1908 or 1909 (p. 123), or possibly later, the witnesses not agreeing as to the exact date (pp. 107, 701).

Originally this scales-house was located near the shore line elevated above top of the bunkers, similar to its situation at Folsom Street (p. 1995). A short time after the Western Fuel Company took possession of this dock, changes and repairs were made, during the course of which the scales-house was removed to the easterly end of the dock (p. 867). Strangely in accord with the situation existing on the Folsom Street dock, after the removal of the scales-house, the position of the weigher was reversed. In handling the scales and in taking weights, he would be faced in an easterly direction, with his back toward the bunkers and the activities there indulged in (p. 687).

EXPOSED CONDITION OF SCALE RODS.

Between 1904 and 1908 the rod which connected the scales beam with the mechanism below the floor of the scales-house at Mission Street, was exposed for its entire distance between the table of the scales and the floor of the scales-house (p. 696), thus enabling a person sitting at the scales table, by pressing his foot against the rod, to effect and have the scales record incorrect weights, which, as we will hereafter show, was frequently done.

METHOD PURSUED IN WEIGHING IMPORTED COAL.

Inasmuch as the defendants claim that one of the reasons for the shortage evidenced by the out-

turn weight of discharged cargoes of imported coal, as compared with the invoice or bill of lading weight, is the method pursued by the Government in weighing the coal, it is essential to briefly refer to the evidence relating to this subject-matter.

Article 1482 of the Government regulations applicable to the weighing of imported coal provides:

“a fairly even beam indicates the weight, but as, in weighing merchandise, it seldom happens, that the beam will stand in exact poise, but will go either above or below an even beam, the weight will be taken on a rising beam” (p. 250).

For the purpose of showing to what extent the weighing of coal on the Folsom Street dock favored the Western Fuel Company, two Customs House weighers of long experience testified on behalf of the Government.

As has already been shown, the weight of the coal contained in the two cars that would be weighed, was approximately five long tons (p. 291). On the lower of the two beams used in weighing, each five pounds in weight was indicated (p. 292). According to the witness Moynihan, who has been an assistant weigher in the Custom House for eighteen years, weighing the coal on a rising beam meant the shifting back of the poise until the beam would gently rise above the horizontal (pp. 293-294). The excess weight resulting from this operation, according to the judgment of the witness, was between five and ten pounds every time two cars of coal were weighed, the witness stating:

“Q. Mr. Dunne has asked you how close to an absolutely accurate weight you weigh the coal at the time the coal is weighed. I will ask you this question: In your judgment as a weigher, having 18 years experience, how close to the actual weight of the coal is the coal weighed when it is weighed by you upon a rising beam?

“A. We try to get it within the decimal of 10 lbs. over and under 5 lbs.

“Q. 10 lbs. over and under 5 lbs.; so that, in your judgment as an experienced weigher, the actual weight of coal would be within 10 lbs. of the weight taken upon a rising beam?

“A. Yes.

“Q. And that is 10 lbs. in how much net weight of coal?

“The COURT. About 5 long tons” (pp. 301-302).

The witness J. W. Dougherty, who was chief weigher at the Customs House, described a rising beam as being

“A beam as when released by the upper brake, if the scale is at balance, will rise with a gentle upward motion, and if allowed to come to rest or to equilibrium, will rise at the center of the scale” (p. 342).

He further testified that he never witnessed the practice indulged in of weighing the coal when the beam would rise rapidly, and that where five tons were being weighed the difference in weight between that obtained upon an even beam and that obtained upon a rising beam would not be over ten pounds (p. 343).

This witness also testified that if the scales were set to weigh a load of 20,000 pounds and a load

of 20,010 pounds were put upon the scales, the beam would rise to the upper brake (p. 354).

While it is true that this testimony was contradicted by the witness Tietjen, called by the defendants, who from experiments claimed that weighing the coal upon a rising beam under the circumstances indicated by the testimony, would favor the Western Fuel Company between 50 and 75 pounds to every two car lots (pp. 1385-6), it is insisted that the testimony of the weighers is entitled to greater weight and must be accepted as conclusive upon this question.

**INVOICES OF FOREIGN COAL OTHER THAN THAT IMPORTED
FROM THE MINES OF THE WESTERN FUEL COMPANY COR-
RECTLY REPRESENTED THE WEIGHT OF THE CARGOES.**

A considerable quantity of coal either directly imported or purchased after importation by the Western Fuel Company came from Australia. Some coal was also brought in from Comox, British Columbia. A very little, if any, was received from Japan. During the year 1912, on account of a strike at the Nanaimo mine, 75% of the coal handled by the Western Fuel Company was imported from Australia (pp. 124-5).

Upon the trial in the court below no testimony was introduced by the defendants tending to attack the integrity of the bills of lading and invoices covering cargoes of coal discharged by the Western Fuel Company, imported from foreign countries other than from its mines at Nanaimo and North-

field. In the absence of such evidence, the jury was justified in assuming that the weight of these cargoes was accurately stated in the invoices. In fact, in the absence of evidence to the contrary, such would be the presumption of law.

Code of Civil Procedure (Cal.), Sections 1919 and 1920;

Wharton on Criminal Evidence, Sec. 527;

Taylor v. U. S., 3 Howe 197; 11 L. Ed. 559;

Buckley v. U. S., 4 Howe 251; 11 L. Ed. 961;

McInery v. U. S., 143 Fed. 729;

Evanston v. Gunn, 99 U. S. 660; 25 L. Ed. 306.

**BILLS OF LADING AND INVOICES OF COAL IMPORTED BY
WESTERN FUEL COMPANY FROM ITS MINES IN BRITISH
COLUMBIA, REPRESENTED THE MINIMUM WEIGHT OF
EACH CARGO.**

Shortly after its organization the Western Fuel Company purchased its mines in British Columbia. One of these mines was located at the harbor of Nanaimo, the other at Northfield. From the time these mines were acquired by the Western Fuel Company until the date of the trial, with the exception of short intervals due to strikes, these two mines were continuously operated by it. Both mines were under the immediate superintendence of Thomas R. Stockett.

The major part of the foreign coal imported into this country by the Western Fuel Company came

from these two mines. Its designation was Wellington, or New Wellington coal. Before being loaded into the ships at the point of exportation it was thoroughly cleansed and screened, and was known as lump coal (p. 107).

BILLS OF LADING AND INVOICES.

When a ship had been loaded with coal, either at Nanaimo or at Northfield, for exportation to the United States, an agent of the Western Fuel Company would make a declaration in writing, in which he would state that the invoice "*is in all respects correct and true*"; that it was made at the place where the merchandise was to be exported to the United States, and that such invoice contained the actual market value or wholesale price of said merchandise at the date of said declaration in the principal markets of British Columbia.

Thereupon the United States consular agent would execute a consular certificate, in which he certified that the invoice referred to in the certificate was produced to him by the signer of the declaration; that he was satisfied that the person making the declaration was the person he represented himself to be, and that the actual market value or wholesale price of the merchandise was correct and true.

The declaration and consular certificate above referred to are endorsed upon the back of the invoice. On the reverse side of the invoice is noted,

among other things, the name of the consignor and its location, the name of the consignee and its location, the name of the vessel, the port of shipment, the ports of arrival and entry, *the value and character of the cargo and the number of tons of coal actually loaded into the ship*. In addition to this, a bill of lading would be issued by the Master, in which would be stated that a *certain number of tons of New Wellington coal, corresponding with the amount designated in the invoice*, had been shipped upon the particular steamer, in good order and condition, by the Western Fuel Company at the port of clearance to the Western Fuel Company or its assigns. The authority of the agent making each declaration was admitted (pp. 209-10).

For samples of invoice and bill of lading see pages 2898-2901, volume 8 of the record.

It sometimes happened that a portion of a ship's cargo would be taken on at Nanaimo and the remainder at Northfield. Under these circumstances a separate invoice and bill of lading would be issued at each of these places, each covering the amount of coal loaded into the ship at the place where the invoice and bill of lading were issued.

THE WEIGHT OF COAL LOADED INTO SHIPS AT NANAIMO AND NORTHFIELD ASCERTAINED.

The Government claims that the exact weight of each cargo of coal exported from British Columbia was known to the Western Fuel Company; that in

some instances this exact weight was represented by the bill of lading and invoice, where the ship was entirely loaded at one mine, or two bills of lading and two invoices, where the ship was partially loaded at Nanaimo and completed her cargo at Northfield; that in either instance, as the evidence proved, a larger quantity of coal was actually laden into the ships than that specified or called for by the bill of lading and invoices. In other words, that in no instance would the weight of the coal loaded into the importing ship be less than the weight specified in the bill of lading, or bills of lading, where more than one, and invoice or invoices, as the case might be; that in those cases where the bills of lading and invoices were inaccurate, the weight of the cargo exceeded the amount specified in these instruments.

As a uniform method of weighing the coal mined and exported from these two mines was not pursued, it will be necessary to consider them separately.

Nanaimo Mine.

So far as the coal mined at, and exported from Nanaimo harbor was concerned, the testimony clearly shows that before being loaded upon the ships, it was accurately weighed and every pound of the cargo was known to the resident representative of the Western Fuel Company. While the Nanaimo mine was located at the harbor of Nanaimo, some of the records of the Western Fuel Company show that for a number of years the

Western Fuel Company had been mining this coal under the harbor itself and not upon the property owned by it (U. S. Exhibit 99). The bunkers maintained by the company were located close to the docks (p. 697). If the coal was not directly discharged into the ships, it would be deposited in these bunkers. Upon leaving the mine every pound of coal extracted, would be weighed. It would then be directly discharged into ships or deposited into pockets of these bunkers. If this coal thus deposited into the bunkers was afterwards discharged into ships, it would again be weighed.

This situation was testified to by Harry Cooper who had been a resident of Nanaimo since 1862, at one time had been harbor master, and for several years had been master weigher for the Western Fuel Company (p. 79). Upon this subject he testified:

“I am familiar with the location of the mines at Nanaimo. They had a Fairbanks scales there. I am also familiar with the docks and the bunkers. The bunkers were located upon the docks, or rather close to the docks, on a grade lower. I don't remember clearly, but I think the scale-house was about one hundred yards away from the docks.

I was first employed by the Western Fuel Company as dock-master, but in less than a year I became master weigher, and remained in the latter capacity until a short time before I left. When I was dock-master I frequently entered the scales-house. As master weigher I had to see all the coal weighed, and my station would be in the weigher-house. The practice was to bring the coal from the mine, weigh it and then dump it into the bunkers. During

the entire time I was employed by the Western Fuel Company I never saw a trainload or carload of coal taken from the mine and discharged into the bunkers or into a ship that was not weighed. The tare weight was painted on the sides of the car. Each car also had a separate number. Tare weights were taken frequently—I should say three or four times a year. Record was kept of the scale-house very particularly on separate papers for each ship, and for the local or other trade; of every day's output of coal, and of the weight thereof, and of the kind of coal. *The weights were taken upon a rising beam.* These were called fair weights. I never saw any coal dumped either into bunkers or ship which was not in fact weighed first" (pp. 679, 680).

The witness then described the method of checking the weight of the coal when being discharged into ships (pp. 680-81). He further testified:

"When a vessel was actually at the wharf they would load the coal directly into her. The bunkers contained pockets; and when coal was being discharged into the bunkers, a record would be kept of each car and of the particular pocket into which it was discharged" (p. 681).

And as showing that when coal was taken out of the bunkers it would be reweighed, he further testified:

"When coal was taken from the bunker into a ship it was weighed again, first being taken back to the scales-house and weighed and eventually returned to the dock and the ship where it would be discharged directly from the cars on to the ship" (p. 681).

And as showing the accuracy of the bills of lading invoices, this same witness testified that the

“Invoices were frequently sent to the American consular officials for certification in order to clear the vessel, and bills of lading would be issued to be signed by the master of the vessel. Upon those occasions the invoice weight would be filled in by one of the office clerks, *and such invoice weight would represent the actual scale weight of the coal*” (pp. 681-82).

N. K. Wills, master mariner, who had been in Nanaimo a great deal of the time since 1908, the last time being in October, 1912, directly corroborated the testimony of Cooper. Since 1910 he had been in Nanaimo for about ten months during each year, acting as port warden. His duties consisted in seeing that the vessels were properly loaded and dispatched, before becoming port warden. As master mariner he had charge of a barge having a capacity of two thousand tons, which carried coal from Nanaimo to Seattle. After describing the location of the scales-house, scales and tracks, this witness said:

“The coal which would pass over the spurs or leads and ultimately reach the various docks would first pass over the tracks upon the scales.
* * *

I saw cargoes being weighed at the scales-house while I was at Nanaimo pretty often. I was frequently in the scales-house myself. * * * I used to take a tally of the cars that were discharged into my barge. * * * I did not visit the scales officially, but I did visit them unofficially. I saw them weigh coal. I never saw a carload of coal discharged into my boat while

I was captain of the 'Two Brothers', which had not passed over the scales. I used to obtain my bill of lading and invoice, after the barge was loaded with coal, at the wharfinger's office. * * * The scales-house was within my observation when I was counting the numbers of cars discharged into my barge. I used to see the cars as they approached from the scales-house. Each and every one of those cars that were within my observation first passed over the scales before they reached the dock" (pp. 336-38).

Hugh Edwards who was United States Customs Inspector at Seattle in September, 1907, was detailed as weigher in a scales-house at Nanaimo where he remained for two days and a night continuously, assisting in weighing coal. In detailing his experience he said:

"Coal was brought to the scale-house on small cars of 5 or 6 tons capacity. The bunkers were nearly half a mile from the scale-house and are right on the dock. The coal goes from the scale-house to the bunkers on cars. * * * The coal that I was weighing was discharged directly into the ship. The tare weights were marked on the cars. The weigher informed me that those tares were taken every so often on all the cars. The cars were weighed separately, and not by trains. As the trains came down the first car was weighed and the train was pulled forward sufficiently to weigh the next car and so on to the end of the train. The net weight of the coal was taken by taking the tare weight marked on the car and subtracting that from the gross weight of the car. Record was kept of the weight of each carload of coal by the weigher who had a tally sheet. I do not think that the weights were being taken on what is known as a rising-beam. The weights were taken as accurately as they could be obtained,

not down to the pound, however, but by 5's and 10's as coal is usually weighed. When you weigh by 5's and 10's the weights usually average themselves and even up. No advantage was given to either party in using these weights" (pp. 112-113).

* * * * *

"The only records of the weights of the coal that I know about which were kept by the Western Fuel Company were those taken by the company weigher on tally sheets. I also kept weights myself and kept them accurately and truly, and they agreed with the weights kept by the company's weigher *because we were taking the weights together at the scales*" (p. 114).

F. B. Winebrenner, also weigher for the Government, visited the scales-house at Nanaimo in March, 1909, remaining there four days, during which time he participated in the weighing of coal. His testimony coincides with that of the other witnesses. He stated:

"My recollection is that only one track passed over the scales, and that that was the track which came from the mine to the bunker. All the coal that went from the mines to the bunkers went over the scales. I think my hours of service were from 7 o'clock in the morning until 12 at noon, and from 1 o'clock until 5. The company's weigher worked with me. We took weights together. * * * The cars were weighed one at a time. The tare weight was marked on the cars. The coal having been weighed was taken directly aboard the vessel. I observed at the bunkers that the coal was discharged into a chute and put immediately aboard the vessel" (pp. 118-119).

Thomas R. Stockett, the superintendent, himself testified:

“The coal is brought to the ship at the wharf from the mine in coal-cars, railroad cars; in passing from the mine to the wharf they pass the scale-house, which is located about 1580 feet below the mine, and it is weighed there, and after weighing is passed up to the wharf and dumped on to the vessels.

“The cars hold, generally speaking, about 5 tons, and we make up our train of about 100 tons; that would be 20 cars; they are brought from the mine by the locomotive and are backed on to the scale, one car being weighed at a time, and as each car is weighed it is pushed on down to a tare-track and the next car weighed, and so on until the whole train is weighed” (p. 1448).

While it is true this witness undertook to state that weights at Nanaimo were taken upon what he understood to be a falling beam, that is, with a beam between the lower break and a horizontal position, as against the positive testimony adduced on behalf of the Government showing the manner in which coal was weighed at this place, such evidence was entitled to no weight. Particularly is this true when we consider that the same witness testified that all coal sold by the Western Fuel Company at Nanaimo, including coal purchased by vessels for fuel purposes, was weighed in the same manner, and that such weight, in his judgment, represented the actual weight of the coal. His testimony upon this subject is as follows:

“Q. Now, as a matter of fact, the man who pays for 5,000 tons of coal say, or a man who

buys 1,000 tons of coal for fuel purposes upon his vessel is charged by you up there for more than 1,000 tons, according to the actual weight, is he not?

A. If he gets 1,000 tons he is charged for 1,000 tons.

Q. But that 1,000 tons he is charged for is 1,000 tons figuring upon a falling beam, is it not?

A. Yes, sir.

Q. And the actual weight of that coal is really one-half of one per cent less, is it not?

A. Not according to our method and our system.

Q. According to your system, is not that so?

A. According to our system it is 1,000 tons'' (pp. 1515-16).

See also testimony of Norcross (pp. 107-08).

Northfield Mine.

At the Northfield mine, two methods of determining the weight of coal were pursued. By one method the coal was actually weighed before being discharged into ships. This system was followed until March 16, 1906, after which the weight of the coal was estimated by the draft of the ship, measured by what is known as a ship's scales (p. 1468). On the face of the wharf was located a perpendicular loading tower. To the top of this tower coal would be brought from the bunkers by means of a conveyor. From this tower, by means of another movable conveyor, the coal was carried to the hatch of the vessel and dropped into its hold (pp. 1457-58). Underneath the bunkers there was a railroad track upon which were two large weighing hoppers connected

with weighing attachments. Each of these hoppers held about five tons. These hoppers would be filled up and before passing the coal on to the conveyor, would be weighed. The coal was then dropped by means of a chute on to the belt conveyor that took it out to the tower (pp. 1460-63). By this method, about 200 tons an hour could be weighed (p. 1463).

After March, 1906, the coal would be conveyed to the vessels by means of an easement chute. This system was devised in order to eliminate the breakage of coal caused by being dropped into the hoppers upon which it would be weighed (p. 1466).

With respect to this chute, the witness Stockett testified:

“To do that we devised an arrangement that is shown on this plan which in our parlance is called an easement-chute. We use the same railroad track that the weighing-hoppers run on; instead of two wheels we have a truck with three wheels on—that is because of the length; the easement-chute goes right up to the mouth of the gates from the bottom of the bunker;
* * * Instead of coal dropping right down to here, as it does in the weighing-hoppers, it simply drops on to this incline and passes on down right here to the conveyor; * * *
(p. 1466).

“The easement-chute was to take the place of the weigh-hoppers for the purpose of avoiding the breaking of the coal in passing the coal from the bunkers to the conveyors that carry the coal to the ship” (p. 1468).

The witness then testified that this chute was installed during the latter part of February and the

early part of March, 1906, and was first used on *March 16, 1906*; that since that date it has been continuously used in shipping coal to San Francisco (p. 1468).

After the easement chute was used, it appears that no further weights of the coal were taken excepting by estimates made from the draft of the boat. This procedure consisted in taking the draft of the boat upon arrival and then again taking it while loaded. The quantity of coal loaded upon the ship would then be estimated by the ship's scales (p. 1470).

Each ship has a scale of its own. This scale is on a blue print and gives the dead weight per inch or foot of draft (for illustration see loading scale of Steamer Thor, United States Exhibit 162). Not content with an estimate made by the ship's scales, a comparison would be made from time to time between the estimated weight of the coal while in the bunkers and the weight indicated by the ship's scales. While some discrepancy existed both ways, at the end of each year the weights were practically in accord, the witness stating:

"We regularly made a table showing the comparison between the estimate of the coal in the bunkers and the estimate of the coal in the vessel, when loaded according to the draft of the vessel. I have not brought those tables with me from Nanaimo. *In answer to the question how those estimates compare, I would say that they fluctuate. There would be differences sometimes one way and sometimes the other way, but there would be no great difference in the course of a year*" (pp. 1498-99).

Practice Showing Fraudulent Overloading of Coal.

It will be remembered that the Western Fuel Company was consigning coal to itself at San Francisco. If the estimated weight was not exact, no prejudice could be suffered because the coal would be reweighed upon its discharge. No valid reason can be assigned why the weights inserted in the invoice, solemnly declared to be true, or in the bills of lading, should have been either increased or diminished. Yet we find that coincident with the action of the Western Fuel Company in ascertaining the weight of each cargo by resort to the ship's scales, and by comparisons between such weights and the estimated bunker weight, fifty tons on half cargoes and one hundred tons on full cargoes would be deducted from the weight thus ascertained, and the weight thus diminished would be inserted in the invoices and bills of lading (pp. 1475-76). This practice was indulged in until November 16, 1907, when it was discontinued because it was recognized to be *without reason or right*.

On November 12, 1907, Norcross, The Western Fuel Company's secretary at San Francisco sent a communication to the company at Nanaimo concerning this practice in which he said:

“In the past you have been making our bills of lading on aggregate shipments to us *less* than the *actual quantity* shipped; *I do not know of any reason for your further continuing this*, and from now on, *please make bill of lading on actual quantity shipped*” (p. 994).

This letter itself shows that the weights contained in the invoices were false and below the *actual* weight shipped. Between the receipt of this letter, and September, 1908, the bills of lading and invoices corresponded with the weight of the cargoes ascertained in the manner already indicated. That no reason did exist in fact for interfering with these weights is shown by Stockett's testimony on cross-examination, in which, after admitting the receipt of the letter above quoted, he states:

"Do you know if at that time the bill of lading weight and the estimated weight practically agreed, about that time?

A. Well I would judge that that was the reason for it.

Q. And how long do you say after the receipt of this letter did you continue to make the bill of lading weight and the estimated weight agree?

A. Until September, 1908" (p. 1508).

Notwithstanding the fact that the loading weights were found to be correct weights, and that the deductions of 50 tons on half cargoes and 100 tons on large cargoes was found to be unnecessary and irregular, and although nothing had occurred to change or alter the situation already shown, between September, 1908, and June, 1909, this practice in an exaggerated form was again indulged in and 3% was arbitrarily deducted from the loading weight of the cargo, the figures reached after such deduction being inserted in the invoice and bill of

lading as representing the correct weight of the cargo (pp. 1476; 1508-09).

Even Stockett was at a loss to account for this change because, upon this subject, he testified:

“Q. What happened during that period of time to bring about a change?

A. I can't tell you exactly how it came about, but I recall that Mr. Howard was up there in August of that year.

Q. That is, in August of 1908?

A. Yes, sir, and it must have grown out of a talk with him that we were evidently careless in the estimating of our weights because there was a growing difference in San Francisco, and his instructions were to be particularly careful. In September when we started to load a cargo, I gave the order about making the deduction 3 per cent. I wanted to be on the safe side; I didn't want any more than we were entitled to, but I wanted to stop any dispute as between the different departments of the company” (p. 1509).

It might be proper at this time to point out to the court that an examination of the discrepancies between the invoice and outturn weights during this period of time will not sustain this attempted explanation.

That the explanation thus given by the witness had no foundation in fact, is further evidenced by his own testimony, wherein he states:

“Q. In 1907, at the time you received the instructions from Mr. Norcross, the company thought it was dealing fairly with itself by accepting as the bill of lading weights the estimated weight?

“A. Yes, sir.

“Q. It was found by experience that it was dealing fairly with itself, did it not?

“A. At that time” (p. 1511).

Evidently realizing that the 3% deduction could not continue to exist without knowledge being acquired by the Government that the invoice weights were grossly inaccurate, and that an investigation would probably follow, pursuant to the letter received by him from Norcross (p. 1477), the witness reduced the amount to be deducted from 3% to 1%, which deduction was continuously made from June, 1909, until the date of the trial (pp. 1475-1476).

And as showing that no valid reason existed for any reduction whatever this very witness testified that the same elements were taken into consideration at the time he concluded to make the bill of lading weight correspond with the estimated weight as when he had made a deduction of 100 tons and 50 tons (pp. 1511-12).

The testimony of this witness is strangely at variance with the testimony of Norcross. This witness was unable to offer any explanation as to why the practice of making deductions from the actual ascertained weights of cargoes should have been indulged in. It seems that between March 16, 1906, and November 16, 1907, a letter would be forwarded to the San Francisco office, practically every time a cargo was loaded, in which would be set forth the weight of the coal actually loaded upon the

ship. With the exception of the weight these letters would be concluded in the following language:

“Please note that we have charged you with 5823 tons, 100 tons more than bill of lading figures” (pp. 992-993).

Upon this subject D. C. Norcross testified:

“I cannot now, any more than before,, give the reason why these charges were made from time to time against the Western Fuel Company at this place for a greater quantity of coal than apparently was placed in these boats, according to the invoice and bill of lading. It is a fact that from time to time we received letters similar in kind to the ones heretofore introduced in evidence, from the Nanaimo office. I presume it is a fact that we received such a letter practically every time a cargo of Nanaimo coal was sent to San Francisco” (p. 992).

It was likewise impossible for this witness to explain why, in the letter written by him to the company's office at Nanaimo, he had stated that they had been in the habit of making out bills of lading on cargo shipments “*less than the actual quantity shipped*”; that there was no reason for further continuing to do this, and that from that time on “please make bills of lading upon the *actual* quantity shipped” (pp. 994-996).

When the practice of making these deductions again commenced, starting at first with 3% and afterwards making it 1%, a bill would be transmitted to the San Francisco office each time a cargo was shipped, at the bottom of each of which bills ap-

peared in black type the *actual* weight of the coal, in the following language:

“Actual weight of this cargo 5822 tons.”

The statement quoted was at the bottom of a bill calling for 5749 tons 560 lbs. (p. 474), which was the tonnage specified in the invoice.

The effect of this practice can readily be appreciated from the discharge of the steamship “Tintania”. There the invoice and bill of lading called for 5696 tons. When she discharged at this port the outturn, or custom weight, indicated that 5725 tons 890 lbs. had been taken out of the ship. In other words, there was an apparent overage of 180 tons. That such overage would have been converted into a shortage is made clear from the testimony of this same witness, he testifying:

“There was discharged, according to the figures in red ink which indicates the outturn or customs weight, 5725 tons, 890 lbs., or about 121 tons more than apparently was in the boat, according to the sworn invoice and the bill of lading; that is correct, is it not?

“A. 25 tons.

* * * * *

“Q. As a matter of fact, if the figures at the bottom of the bill indicating the actual weight were in fact the weight of the cargo of coal, instead of there being an overage, there would be quite a shortage, would there not?

“A. Yes” (pp. 479-480).

Tidwill himself explains the effect of this procedure:

“Q. Now it is also true, is it not, that in a great many instances, if you take the bills

as correctly setting forth the actual weight of the coal deposited into the steamship at the port of exportation, that instead of there being an overage, there would, in fact, be a shortage?

“A. A shortage, yes, sir” (p. 640).

Practice Not Confined to Northfield Cargoes.

Defendants claim that they were warranted in making these deductions because of the manner in which the coal was weighed at Nanaimo. This was the only reason assigned, or that could have been given for such conduct. That no justification existed for indulging in such a practice at the Nanaimo mine (known as Mine No. 1), was conceded; in fact, Stockett himself testified:

“There was no reason to make a deduction from the cargoes that were loaded exclusively at No. 1 Mine, and at first there was not any; * * *” (p. 1469).

Notwithstanding this situation, the same deductions that were made at Northfield were likewise made in nearly every instance as to the cargoes shipped from Nanaimo. Even Stockett was unable to explain this, because, following the evidence last quoted, he testified:

“Afterwards it seemed to have dropped into the regular course of events and the men who made the bill of lading and invoices out at the general office perhaps overlooked the fact that the vessel was loaded exclusively at the No. 1 Mine. That is the only explanation I can give as to why some of those cargoes have a deduction made from them” (pp. 1487-1488).

At pages 1479 to 1486 is contained a statement showing all cargoes shipped from these two places between April 4, 1906, and January 1, 1913. An examination of this statement will show that many cargoes were entirely loaded at Nanaimo (Mine No. 1), as well as partially loaded there, and that in nearly every instance the deduction testified to was made.

**THE APPROXIMATE WEIGHT OF COAL ON WHICH THE
WESTERN FUEL COMPANY FAILED TO PAY IMPORT
DUTIES.**

During the trial in the court below, invoices covering cargoes of all vessels carrying foreign coal discharged by the Western Fuel Company between April 1, 1906, and December 31, 1912, together with the respective consumption entries made upon the arrival of these vessels in the port of discharge, were introduced in evidence (pp. 213-14). Immediately after these cargoes were discharged, the outturn or ascertained weight would be endorsed upon the consumption entries. The difference between the invoice weight (which was also the bill of lading weight) and the outturn or discharge weight (also called the ascertained weight) would determine whether there was a shortage or overage. If the discharge weight was less than the invoice weight, a shortage to that extent existed in the cargo. If the discharge weight exceeded the invoice weight, it would constitute an overage.

With these entries and certain other records of the Western Fuel Company also offered in evidence as his foundation, special agent Tidwell prepared a table showing all foreign coal in the possession of the Western Fuel Company on April 1, 1906, and covering every cargo of imported coal received by this company between that date and January 1, 1913. A copy of this table will be found on pages 2687 to 2738, Volume VIII of the record. An examination of this table will disclose that it contains a statement of the amount of foreign coal on hand April 1, 1906, the number of the entry, the name of the ship carrying the cargo, the *invoice* weight of the cargo, its out-turned or ascertained weight, and the amount of shortage or overage, as the case might be.

According to this table, the accuracy of which was not disputed, between these two dates the shortage in these cargoes aggregated 26,044 tons 1965 lbs. The overages amounted to 5324 tons 1291 lbs. Deducting the overages from the shortages, a net shortage results of 20,720 tons 674 lbs.

In making these calculations, however, the quantity of coal *actually* loaded upon these vessels is not considered; figures based upon these *actual* weights are referred to later.

It is and was strenuously urged by defendants that because upon these figures the average shortage computed upon the total amount of coal imported only amounted to about one per cent its existence did not tend in any degree to establish fraud. In fact, the same claim was made concern-

ing overages which will be considered later on in this brief. This argument is confessedly illogical and devoid of merit. In the first place, a conclusive and unanswerable response to this claim is found in the evidence to which the court's attention will shortly be directed, establishing positive and specific instances of fraud resulting in, causing and accounting for these shortages.

Again, a general average based upon the entire volume of business done by a corporation is no criterion by which to determine whether specific acts of fraud have been committed because such claim assumes that the course of conduct asserted to be criminal in its character resulting in said general average is consistent with the legitimate and orderly carrying on of such business and inconsistent with any other theory. In the instant case, however, eliminating from consideration for the moment the evidence affirmatively establishing fraud, an examination of the record will not only show that many cargoes ran short 2, 3, 4 and 5 and some as high as 7 per cent, but that when certain cargoes were discharged at San Francisco, a shortage resulted, while, when cargoes were discharged from the same vessel at Oakland, almost invariably an overage would exist, or the shortage, if any, would be inconsequential. The fallacy of applying a percentage test for the purpose of determining whether certain established conditions are the result of criminal conduct can likewise be readily illustrated.

Let us assume that a certain firm is selling coal to the Government.

The volume of business done by this firm amounts to one million dollars a year. During the course of a year the Government is defrauded out of \$10,000, representing the value of coal sold to it and underweighed. The frauds resulting in this loss were committed at irregular intervals during the year. A criminal prosecution follows. The defense is that the sum involved represents only one per cent of the total volume of business done. Would such defense be given any serious consideration in a court of justice? If so, it would follow that the individual defrauding the Government out of \$10,000, whose annual receipts were not very far in excess of that sum, would be forthwith adjudged guilty, while another individual committing the same offense, doing a large volume of business a year, would be immune from punishment. In other words, it would result in one law for the rich and another for the poor.

**Amount of General Percentage of Overage Great Deal in Excess of
That Shown by Table "A".**

From time to time the Western Fuel Company purchased partial or split cargoes of coal. For instance, the Western Fuel Company would purchase a portion of a cargo and when that portion of the cargo had been discharged by it, the vessel would leave its dock and proceed to Oakland, or some other dock where the balance of its cargo would be removed. At other times, the company

would purchase the balance of a cargo, a portion of which had already been discharged. In a majority of these instances, the vessel would turn out short. Inasmuch, however, as it was not possible to establish to any degree of accuracy at what point the shortage occurred, in preparing Table "A" each of these split cargoes was treated as though no shortage occurred (pp. 273-74; 308-09). In other words, the outturn weight would be taken as the true weight. During the trial a supplemental table was prepared by Mr. Tidwell (United States Exhibit 125, Table "D") in which these split cargoes were eliminated (p. 313). While such action did not either increase or diminish the amount of shortage so far as tonnage was concerned, it increased the general percentage of shortage to 1.7 per cent (pp. 310-313).

General Percentages Where Shortages Alone Considered.

In preparing both of the tables above referred to, the overages were taken into consideration and their aggregate amount deducted from the total shortage. If general percentages were to be indulged in at all, they should have been confined to the cargoes that turned out short. Taking into consideration these cargoes alone, the general percentage of shortgace based upon the total weight of the cargoes in which a shortgace occurred, amounted to 1.84 (pp. 385, 672).

General Percentages Where Loading Weights Considered.

If loading weights of cargoes were considered, both the actual shortage and the general percentage would be largely increased.

In a former part of our brief we presented that part of the record showing that the weights specified in the invoices and bills of lading covering cargoes of coal imported from Nanaimo and Northfield were far below the weight of the coal actually loaded upon the vessels. During the trial, a table was prepared showing the actual loading weight, the invoice weight, and the ascertained or out-turned weight of each of these cargoes. This table is United States Exhibit 135 and is contained on pages 2867 to 2873 of the record. According to this table, the net shortage representing the difference between the actual weight at the mines and the ascertained or out-turned weight was 10,280 tons 1445 lbs. The difference between the actual loading weight at the mines and the invoice weight was 6583 tons. The general percentage of shortage based on the actual loading weight was 2.2 per cent. The percentage of shortage represented by the difference between the invoice and out-turn weight was .8 per cent (p. 2873).

It will thus be seen that notwithstanding the fact that the invoice weights were far below the actual weight of the coal loaded into the vessels, a general shortage of almost one per cent occurred at the point of discharge.

Specific Instances of Shortages.

While under examination, Mr. Tidwell gave specific instances of shortages, each of which was taken from Table "A" already referred to. These shortages were based exclusively upon the difference between the invoice or bill of lading weight, and the out-turn or ascertained weight. In no instance was the actual loading weight considered.

A partial list of some of the vessels referred to, together with the specific percentages of shortage will be found on pages 386-387 of the record. The percentage of shortage based upon the invoice weight runs from 2 per cent in some cases, to 7 per cent in others (pp. 386-87).

SPECIFIC INSTANCES OF FRAUDULENT CONDUCT DISCLOSING CAUSES OF SHORTAGES.

It may have been gathered by the court from what has already been said, what the claim of the Government is respecting the manner in which many of these shortages occurred. To briefly re-iterate, its contention is that these shortages were brought about by the following practices:

1. By overloading the coal cars and permitting the coal to drop down into the in-shore bunkers without being weighed;
2. By opening up hopper chutes and permitting the coal to drop down into the inshore bunkers without being weighed;

3. By deliberately opening the sides of cars and dumping the coal into the inshore bunkers before being weighed;

4. By weighing the coal upon a platform scale, a portion of which came in contact with one of its supports, thereby registering incorrect weights;

5. By using a peculiarly constructed link between the second and third cars, thereby forcing an inaccurate weight to be taken;

6. By direct interference with the scales-rod, causing inaccurate weights to be taken;

7. By dumping coal loaded into the coal cars into the inshore bunker without being weighed, and during the absence of the Government weigher.

Each of these charges is supported by affirmative and specific proof, the truth of which was believed by the jury.

DISCHARGE OF UNWEIGHED COAL INTO BUNKERS.

That coal was frequently permitted, without being weighed, to drop into the bunkers below, and upon many occasions, under express instructions, was dumped and shoveled, without being weighed, into these bunkers, was thoroughly established. In this connection it might be well to state that it was the duty of the Western Fuel Company to maintain a permanent flooring about the hoppers while coal was being discharged, or at least locate a temporary flooring in their vicinity and it cannot absolve itself from liability by claiming that a considerable

quantity of this coal dropped into bunkers below without affirmative action on its part.

With reference to this matter the witness Water-doll testified:

“If the hopper gets away from me, she would be liable to bury my car. That is, the weight would take too much of a run on the gate and she would overflow; you couldn’t pull up the gate quick enough. *That occurs quite frequently. The coal would then roll off the car and down into the bunkers underneath.* * * * It is pretty hard to say how often they would be overloaded. It is hard to answer; *it occurred frequently off and on.* It would occur more than twice a day on my train, more than four or five times a day I should say” (p. 1036).

And as showing that this was done under positive instructions he further testified:

“I saw those cars being discharged before they went on the scales; not quite often, however. I received instructions from Mr. Mayer to do that” (p. 1036).

* * * * *

I received instructions from the defendant Mayer to dump a car into the bunkers before it would reach the scales. I did that. It is pretty hard to say how often” (pp. 1037-38).

And as further showing deliberation on the part of the defendants, this witness further testified:

“If my car was overloaded, I would pull the rope and let half of it go into the bunker below and then load her up again.

* * * * *

At the request of Mr. Mayer I discharged a train load of coal into one of the pockets or

compartments of the inshore bunkers without bringing it on the scales" (p. 1039).

* * * * *

I could not say how often it would occur during every week that I would open a chute attached to one of these towers, and the chute would remain open so that the coal would continue to drop along the sides of the car and into the bunkers below. It would not occur every day. Sometimes it would maybe occur more than once upon a particular day. I have myself shovelled coal that would fall from the cars into the bunkers below, and have seen other men doing it" (p. 1038).

This witness also testified that coal would frequently strike the beam already described, supporting the scales-house, causing it to fall between the cars, and that to avoid striking this beam, coal would be shovelled off the cars into the bunkers below (p. 1038).

That the temporary planking was frequently not used, is also shown by this witness who testified:

"Sometimes I saw that temporary decking removed. I remember that upon occasions inspectors in the employ of the Government would visit that dock. I never received any instructions from the defendant Mayer in connection with such visits. In relation to the inspectors, Mr. Mayer would come down and say, 'Cheese it, Joe, Look out for them; there is an inspector coming up the stairs'" (p. 1039).

As to this Griffin testified:

"The planking is placed down I suppose to save the coal from going into the bunkers. I stated that sometimes they forgot to put the planking down" (pp. 1069-70).

Again, on cross-examination, Waterdoll states that upon occasions the defendant Mayer would instruct him to run a train back to the pockets and dump it without having it weighed (pp. 1044-45).

Relative to the same matter the witness Griffin testified:

“Sometimes the cars would not be full and sometimes they would be overflowing. The overflow would be thrown off and would go down into the bunkers. * * * Sometimes a lump of coal would go into the chutes, and hold the chute open. Then the dumper would have to run upstairs and try to get the lump out. In the meantime the coal would come out, and what would not go down into the bunkers would be thrown in by the men. The coal would continue to flow into the bunkers until the lump was taken out, that is the fine coal would flow. Sometimes it would take from two to five minutes to do that. That would happen maybe two or three times a day; maybe it would not happen at all” (p. 1065).

During the street-car strike the customs-house weigher reached the dock at eight o'clock. The employees of the Western Fuel Company, however, would arrive at 7 o'clock. During the intervening hour a considerable quantity of coal would be dropped into the bunkers below, Griffin testifying:

“We were supposed to be there at 7 o'clock and as soon as we would arrive we would empty the hoppers before the weigher got there. The coal that came out of the hoppers was dumped into the bunkers unweighed” (p. 1065).

And as showing that cars were frequently discharged without being weighed, the same witness said:

“I have seen cars unloaded before the coal would be brought upon the scales. That would be done whenever they got a chance to pull the doors open. The motorman would do that under Eddie Mayer’s direction. I never pulled them open myself, but saw other men do it. I did not know of the presence of inspectors upon that dock. Eddie Mayer said when there was nobody around, ‘Dump the cars if you get a chance.’ He made that statement only once” (p. 1066).

It appears also from the testimony of this witness that the temporary planking, when laid, would subserve no beneficial purpose because the coal that would fall upon it, as well as upon the framework of the bunkers, would be shovelled into the bunkers below (p. 1066).

In describing how, upon occasions, to clean the hoppers out, coal would be discharged, without being weighed, into the bunkers, the same witness testified:

“When the hoppers are filled they would sometimes load the cars up and then open the side doors of the cars, so as to let the coal down into the bunkers below. At that time the cars would be located beneath the hopper. That was done under Eddie’s direction. No part of that coal was weighed” (p. 1073).

That cars were frequently overloaded and the coal permitted to roll off into the in-shore bunkers, was also testified to by the witness, David Powers (p. 695). And, that coal was discharged, during the

absence of the government weigher, was also established by him. Upon this subject he testified:

“On a number of occasions at noon or at five o’clock, I used to see the chutes underneath the hoppers at Mission street opened up so that the coal would run into the bunkers. At such times the Government weigher would be away eating his dinner, or if it occurred at night, he would be at home. * * * It was another common occurrence at Mission street to load up the car when the weigher had gone to lunch, pass over the scales with it, and at five or ten minutes to one, empty such car into the bunkers, then load it up again and have it ready for the weigher when he came back at one o’clock. Such car-load of coal would not be weighed at all. The defendant Mayer certainly saw these operations to which I have just testified” (p. 695).

On the Mission Street bunkers, the hoppers were operated by means of a cord which, when pulled, would open the chute cover and let the coal into the car (p. 703). As to what occurred at this place, the same witness testified:

“It was a common occurrence to see the chute thus opened and the coal permitted to run down the sides of the car into the bunkers” (p. 703).
* * *

“A number of times they used to load a car up just before the weigher would go to lunch, that is, a few minutes before 12 o’clock, and run it over the scales and back again, and switch it back five minutes to one, dump it into the bunker, and then load it up again before the weigher returned. That occurred both at Folsom street and at Mission street and was frequent” (p. 703).

It seems, too, from the evidence of this witness, that on many occasions he had conversations with the defendant, Mayer, regarding the shortweighing of imported coal (p. 708).

During the month of January, 1913, the same witness, accompanied by John W. Smith, government employee, was watching the discharge of coal on the Folsom Street bunker. About five minutes to twelve, Mr. Phelan, the government weigher, left the dock for his lunch. After Phelan had left, a train load of coal was dumped without being weighed. At this time, Mayer was acting as weigher on the dock. After being dumped, these four cars were again loaded with coal and permitted to remain until Mr. Phelan returned from his lunch, whereupon they were run up to the scales and weighed (pp. 710-11; see also testimony of John W. Smith, pp. 1007-08).

Although Edward Powers had never assisted in loading cars, at times he had seen coal running over the sides of the cars into the bunkers below (p. 868).

That upon occasions, after business hours, coal would be dropped from the hoppers directly into the bunkers below, is attested by the witness Robert Sass who was employed on one of the barges of the Western Fuel Company. He testified that:

“Twice I saw coal running out of the hopper into the bunkers after five o’clock. The work was all stopped and I was making the barge fast, tying her up for the night, and I heard the noise. It was the coal running that attracted my attention, and I looked up to the

bunker and saw the coal running out of the hopper into the bunker. It was coming right out of the hopper into the bunker. * * * I saw one hopper emptied in that way on one night, and the other hopper emptied on the next night" (pp. 1099-1100).

In fact, the activities of the Western Fuel Company in this direction must have become more or less notorious for, according to the testimony of J. T. F. Burns, a custom house employee, as far back as 1908 the Government was in the habit of sealing up the sides of the coal cars and the chutes during the night time and between 12 and 1 o'clock of each day (pp. 1158-59).

According to this same witness, upon one occasion he saw a coal car so located under a hopper chute that half of the coal went into the car, and the other half went down into the bunkers, and when the car was loaded, the next car was moved forward to the same position, with the same result (pp. 1159-60).

J. F. Barfield, an assistant weigher, upon one occasion observed an employee of the company shoveling coal from the flooring near the car tracks into the bunkers (pp. 1170-71), and assistant weigher Freund many times observed coal being shovelled from the framework or runway of the Folsom Street bunkers into the bins below, having made many reports concerning these observations to chief weigher Wooster (pp. 1175-76).

Albert E. Aitken, a ship's clerk, employed to look after the interests of the shipowners, almost daily

saw coal being spilled into the bunkers without being weighed (pp. 1187-88).

A. H. Freund, an assistant weigher, in detailing his observations concerning the shovelling of unweighed coal into the bunkers, said:

“I have many times, during the time that I have acted as assistant weigher on the Folsom Street bunker, observed coal being shoveled from the framework or runway into the bins below. I complained to the man himself who was doing that, and, another time, I told Mr. Mayer and he went down and scolded the man in my presence. The operation was not afterward repeated that I saw. I did not again see coal shoveled into the bins below on that ship, but I afterwards saw them doing that on other ships, but I cannot say how many times. I made several reports in regard to the work to Mr. Wooster” (1175-76).

Mr. Wooster was the chief customs weigher.

And in explaining why it was not possible for the assistant weigher to prevent the practices here complained of, this same witness testified:

“The weighing is more or less rapidly done. If the weigher were to turn around and face easterly, he would only be able to see the first hopper. He could not see coal being discharged from the hoppers into the cars and from the cars into the bunkers below, even though he looked easterly. There is considerable noise made in discharging the coal into the hoppers and that noise continues always” (p. 1175).

Short Weighing by Tubs.

It sometimes occurred that imported coal would be discharged at docks upon which there was no

scales-house. Upon these occasions the weight of the coal would be determined from average weights, one tub out of every fifteen, or four out of sixty, being weighed. By the average weight of these tubs, the weight of the remaining tubs of coal would be determined. It will thus be seen that if all of the tubs were not evenly filled, the weights taken would be inaccurate and misleading. In weighing out this imported coal, the tubs that were to be weighed would be very light, while those that were not weighed would be filled. This practice was just the reverse of what occurred on the barges, to which reference will hereafter be made. The effect of this practice was to underweigh the coal discharged.

According to witness, David Powers, the occurrence just described was frequent (p. 711).

Philip Ganesi, a shoveller, in referring to this practice said:

“During these four years, also, I sometimes worked in the hold of a ship that was discharging imported coal, and upon those occasions the coal would sometimes be weighed upon the decks of the ship. They would tell me then, ‘Don’t you fill too much when they are going on the scales, otherwise the Western Fuel people will get mad if you fill them up too much.’ That was in connection with the imported coal” (p. 1107).

Testimony to the same effect was given by Jim Balestra, another shoveller (pp. 1120-21); and by Tony Belish who testified:

“When a ship was being discharged over side of imported coal, the tubs that were weighed

would, a good many times, be lighter than those which were not weighed" (pp. 1137-38).

William J. Delaney, a deputy collector of customs, and who formerly had been an assistant government weigher, described the difficulty encountered by him while acting as ship's clerk in keeping the tubs evenly filled during the time a ship was discharging, stating:

"I had quite an altercation with the representative of the Western Fuel Company about the manner in which the coal was being weighed on the deck of the ship on small scales. The coal was placed upon the scales in tubs.

Q. You say it was all weighed in tubs on scales; state what if anything, you observed with reference to the discharge of that ship while you were acting as ship's clerk?

Q. Well I noticed that when a tub was called for by the United States weigher, that oftentimes it did not seem to be representative of the total amount of coal that was being discharged, and I had an altercation with Mr. Mayer, the clerk for the Western Fuel Company about his going into the hold of the ship.

Q. Do you know how long it took to discharge that ship?

A. Well about three days I think.

Q. How frequently did you notice that the tubs which were weighed by the customs weigher did not represent the average tub that was hoisted?

A. Well it did not happen very often because I did not permit it to happen.

Q. Let me ask you this specific question, Mr. Delaney; you remember the tubs that were being hoisted for the purpose of being weighed, do you not?

A. Yes, sir.

Q. Now to what extent were the tubs which were hoisted for the purpose of being weighed, filled with coal?

A. Well, sometimes they were not representative of the total number of tubs hoisted.

Q. What do you mean by not representative of the total number of tubs hoisted?

A. Well, the tub that was weighed, would sometimes not weigh as heavy as the general average.

Q. How frequently did that occur? How frequently did it occur that tubs were brought up for the purpose of being weighed which did not contain as much coal as was contained in the average tub?

A. Well this happened several times until we had a big row about it and then it stopped. I could not say the number of times that that happened" (pp. 1190-93).

Interference With Scale Rod.

That the exposed scale rod on the Mission Street dock was utilized by the defendant Mayer to short-weight the coal, was also shown. David Powers, describing this situation, said:

"Mr. Mayer used to sit right next to the rod, with his feet on the rod. I saw him put his feet up against the rod several times. He used to talk about it himself. He used to boast about how much money he was making and how he was robbing the Government and robbing these 'lime juicers,' as he used to refer to them, meaning the steamers that used to come there for the Western Fuel Company. Every time you would meet him he would tell you about how much he stole, or what he was doing" (p. 696; see also pp. 703-04).

That Mayer did interfere in this manner with the scales rod is shown by the testimony of A. H. Freund, a customs weigher. According to this witness, he and Mayer would both sit at the scales table, both facing the beam and using the table in keeping their books. Evidently being suspicious of Mayer, upon one occasion when the latter went out to give instructions to the motormen into what pockets of the bunkers to distribute the coal, Freund rubbed the rod with a piece of chalk. Mayer returned and resumed his seat. Shortly afterwards, Freund noticed the chalk on Mayers' pants and cautioned him to thereafter keep away from the rod (pp. 1173-75).

Defective Condition of Platform Scales.

In August, 1905, the steamer *Germanicus* arrived with a cargo of coal from Ladysmith, British Columbia. According to the bill of lading and invoice, she had on her, 5970 tons of Wellington lump coal. Her outturn weight was 5603 tons, or a shortage of 347 tons, 110 lbs. On account of the character of the shortage, the collector compelled duty to be paid upon the invoice weight (pp. 500-02).

On August 29, 1905, during the same month, the steamer *Dumbarton* arrived carrying a cargo from the same port. According to her invoice and bill of lading, her cargo weighed 2680 tons, the shortage being a little over 66 tons (pp. 502-04). Only a part of the cargo was discharged by the Western Fuel Company (p. 504). A few days before the

arrival of the Dumbarton, the witness, David Powers, had a conversation at Mission Street with the defendant, Mayer, in which the latter informed him that the scales would rest or be upheld by blocks or uprights underneath them so that they would not register the true weight, and that he knew all about it (pp. 703-04).

This testimony is corroborated by the witness, J. L. Bley, a custom house broker, who was representing the agents of the consignee of the cargo in the Dumbarton (pp. 1193-94). He, in company with Wooster, chief weigher, made an examination of the platform scales on the Folsom Street dock and ascertained that a part of these scales rested upon, and came in contact with one of the four uprights located underneath the scales, interfering with the weight (pp. 1194-1200). In describing this upright he testified:

“Q. Had the top of the upright which apparently had come in contact with the platform of the scales been worn down to any extent, and if so, to what extent?

A. Well, it was to some extent; I cannot recall to what extent it was worn down, but it was to some extent; that is, it was visible to the naked eye that the platform had rested on it.

WITNESS (continuing). The upright that I examined had apparently been worn down at a recent date. I remember the chief weigher contended that it must be of recent origin but my contention at the time, if I remember correctly, was that it might have been for some period past” (p. 1199).

Improper Use of Link.

The coal cars contained in each train were joined together by the use of links. As has already been shown, two cars at a time would be weighed. Upon one occasion, about 1906, a peculiar link was used between the second and third cars of one of the trains so as to throw part of the weight of second car on the third car and when on, inaccurately, and with the advantage in favor of the Western Fuel Company, weigh the coal contained in the cars (p. 1183). In describing this situation, A. H. Freund, assistant weigher, testified:

“Well, there are four cars worked up there and they are weighed two at a time; they are all linked together, one motor-car. I was weighing. * * * Having weighed the first two cars of a train, I think the weight went in the neighborhood of something like 17,500 and as they pulled off and they weighed the second two, I saw that the cars were heavily laden and I thought that there must have been something wrong with the weight, so I insisted on the motorman bringing those cars back and reweighing them.

* * * * *

I had the motorman back up his cars, and I reweighed them, and where they first weighed something short of 18,000, the next weight was about 25,500 (pp. 1183-84).

* * * * *

In taking the second weight, all cars were pushed backward and weighed in that manner” (p. 1185).

The witness then testified that he communicated with the chief weigher, Wooster, who, in turn,

brought the Fairbanks scale man to the dock. Indicating the cause of the improper weight, the witness proceeded:

“Then we discovered that there was a short link between the second and the third cars that when the first two got on, the short link in some way held the cars up a little on the scale in order to make a difference of somewhere around 2,000 lbs.

I believe this link was shorter than the links between the other cars. I examined the links myself. I should imagine it had been in service some time. I don't think it was a new link, but I didn't notice particularly” (p. 1185).

That this situation was known to the defendant Mayer was testified to by David Powers, who said:

“I had a conversation, however, with him (Mayer) regarding the link which was in use for the purpose of short-weighting coal. I have forgotten the date of the conversation, but I know that a man named Murray was then weighing coal for the Government. Murray made the blacksmith change the link and Mayer spoke about it and said, ‘Why, gee, we ain't doing a thing to these lime juicers and these other people (he meant the Government) with the bent link between the second and third cars.’ * * * Mayer told me how he was defrauding the Government with this link. * * * Mayer told me that the link was bent in such a way that it would lift a certain amount of weight off the last two cars. He did not tell me how long the link had been in use” (pp. 704-05).

Discharge of Steamship "Wellington".

Between 1904 and 1912 coal was imported by the Western Fuel Company in the steamer "Wellington". Upon her arrival at the harbor of San Francisco the cargoes would sometimes be discharged by the Western Fuel Company at its docks in San Francisco and at other times at the Howard Bunkers in Oakland. During the trial in the court below a statement was introduced in evidence by the Government showing the invoice weight of each cargo imported into this harbor on the steamer "Wellington" during the period above referred to. This statement shows the date of the arrival of the vessel at this port, the entry number, and whether she discharged short or over. A copy of this statement is found on pages 2893-94, volume 8 of the record.

A comparative statement was then introduced showing the difference between the results of the discharge of this steamer in San Francisco and her discharge in Oakland. This statement is United States Exhibit 155 and will be found at page 2896, volume VIII, of the record. Its examination will show that during these years she discharged upon 27 occasions in San Francisco. Upon 20 of these occasions she turned out short, and upon 7 occasions, over. The result of her discharge in San Francisco was a shortage of 1348 tons 2100 lbs., and an overage of 151 tons 360 lbs., or a net shortage of 1197 tons 1740 lbs.

During the same period of time she was discharged 44 times in Oakland. Upon 15 of these occasions she discharged short, while upon 29 occasions she discharged over. The result of her discharge in Oakland was 449 tons 1310 lbs. short, 1098 tons, 410 lbs. over. In other words, the net result of her discharge at Oakland was an overage amounting to 648 tons, 1340 lbs.

The facts established by this table are very significant when considered in the light of the evidence given by the witnesses touching the practices indulged in upon the Western Fuel docks in San Francisco when coal vessels were being discharged.

Discharge of Steamship "Algoa".

During the early part of 1908 the "Algoa" was utilized by the Western Fuel Company as a store-ship. Part of her cargo came from the steamship "Indra" and the remainder from the steamship "Thyra". According to the out-turn or discharge weight 6248 tons 652 lbs. of the cargo contained in the "Indra" was loaded into the "Algoa". 2170 tons 1461 lbs., according to the out-turn weight, was taken from the steamer "Thyra". According to the out-turn or discharge weight, therefore, the total coal stored in the "Algoa" amounted to 8418 tons 2113 lbs. (pp. 888-90). At this point it might be interesting to know that the "Indra" discharged short 268 tons 1868 lbs., while the discharge of the "Thyra" disclosed a shortage of 69 tons 1329 lbs. (p. 889).

After the "Algoa" was loaded, her hatches were put on and she was towed to Mission Bay (p. 889).

The "Algoa" lay in the stream for about eighteen months, by which time her cargo of coal was fully discharged. The date of her final discharge was June 29, 1910 (pp. 893-96). The total weight of the coal thus laden into the "Algoa" upon discharge amounted to 8535 tons 677 lbs., an increase of 116 tons 804 lbs. above the weight of the coal with which she was loaded (pp. 898-99). These figures are shown by the entries made in Mill's books. It also appears that between 50 and 100 tons were placed in the "Algoa's" bunkers, to replace coal used for fuel in discharging, which would proportionately increase the more. No entry of this coal was made (p. 977).

It might also be interesting to note, although this will be referred to later, that notwithstanding the weight of this coal, when discharged from the "Algoa" into the barges amounted, as already stated, to 8535 tons 677 lbs., when shortly thereafter it was delivered from the barges into the other vessels and again weighed, the record of these last weights disclosed that it had greatly increased in weight.

Import Duties Paid Upon Discharge Weight.

Although the court will take judicial notice of the fact, the evidence shows that the duties paid to the Government are ascertained and paid, not upon the invoice weight, but upon the out-turn or discharge weight (p. 136).

COMPARISON OF EXISTING SHORTAGES BETWEEN IMPORTATIONS OF COAL BY WESTERN FUEL COMPANY AND OTHER IMPORTING COMPANIES.

In the brief filed by plaintiffs in error it is asserted that if a comparison is made between the net shortage in cargoes of coal imported by the Western Fuel Company and the shortage resulting from the discharge of coal imported by other companies engaged in business in San Francisco, it will appear that such shortage is of no special significance and is unavailing as an imputation of fraud, but is the natural and expected result, considering the character of the commodity handled and the manner in which the coal is weighed on importation. The figures, however, to which resort is suggested, strongly corroborate the claim of the Government.

Preliminarily, it may be said that a general average of shortage or overage, as we have already pointed out, is not the proper method of arriving at any satisfactory conclusion as to whether fraudulent conduct was indulged in. Aside from this, however, counsel for plaintiffs in error have overlooked the exact extent of the shortage existing in the cargoes of coal imported by the Western Fuel Company from Nanaimo and Northfield. At the expense of being tedious, we recapitulate.

Taking into consideration split and partial cargoes, as well as overages, the general percentage of shortage is slightly less than one per cent. Eliminating split cargoes alone, the shortage reaches

1.07%. Eliminating overages and taking into consideration only cargoes that were short, the general shortage reaches 1/84%.

Directing our attention alone to coal imported from Nanaimo and Northfield, and basing our calculation upon the actual weight of the cargo as contra-distinguished from the invoice weight, the net shortage of these cargoes reaches 2.2%. Incidentally in passing, we might also observe, as has heretofore been emphasized, that if we consider the actual weight of cargoes of coal imported from these two last mentioned places, practically all of the overages occurring at the point of discharge will disappear.

There are other circumstances too, which are entitled to consideration in making the comparison suggested. In reaching San Francisco Australian coal is on the water approximately 5 weeks, and during this trip passes through the tropical heat of the equator. If there is any merit in the claim of the experts that coal after it is mined, under certain circumstances will distill moisture, this journey, under the conditions pictured, might account for some shortage. On the other hand, British Columbian coal is on the water only 4 days, and, as Professor Branner, says:

“Q. Now, assume that a cargo of coal was placed upon a ship at Nanaimo and transported to San Francisco and the coal is four days in transit to this port, and assume that the hatches of the vessel are closed in transit, in your opinion would there be any appreciable diminu-

tion of the weight of that coal during that period of time?

A. I should not think so.

Q. And, in your opinion, would there be any appreciable increase in the weight of that coal during that period of time?

A. Not if it is kept dry.

Q. The oxidation during that period of time would be practically nil, would it not?

A. It would amount to but very little, indeed.

Q. It would be negligible, would it not?

A. I think so'' (pp. 1822-3).

Again, in the discharge of Australian coal, the consignee from whom the Western Fuel Company purchased the cargo was always represented by a ship's clerk who, as best he could, would see that the cargo was entirely weighed. Of course, his abilities in this regard were limited and circumscribed by those obstructions which prevented the Government weigher, had he so desired, making the necessary observations to protect the Government against loss. If, therefore, Australian cargoes of coal could be discharged with but little, if any, shortage, after a lengthy journey, it must be apparent that at least no greater shortage should exist in cargoes imported from British Columbia.

Result of Discharge of Imported Coal, Incorrectly Stated.

On pages 44 and 45 of the brief filed by plaintiffs in error, a purported result of the discharge of imported coal by various concerns, including the Western Fuel Company, is stated. Upon these comparisons, an argument is made that the shortage

in the Australian cargoes discharged by the Western Fuel Company compares favorably with similar cargoes discharged by other concerns. Among the shortages cited, however, are the following:

“Net shortage on Australian coal,
March to September, 1907, dis-
charged by Southern Pacific Co., 8/100%
(meaning 8/100th of 1%)
Net shortage on Australian coal, No-
vember 1907-April 1910, discharged
by Hind, Rolph & Co. 3-4/100%”

This last figure, if correct, would tend to show a general average of shortage tremendously in advance of any shortage that could be imputed either to the Western Fuel Company or to any of the other discharging companies. An examination of the transcript, however, will show that remarkable as it may seem, Hind, Rolph & Co., although personally discharging only three cargoes, always discharged well over, a powerful circumstance considering the record in this case attesting the honesty and integrity of this firm. According to the bill of lading weight, their cargoes aggregated 16,417 tons. Upon discharge, the out-turn or custom weight indicated 16,975 tons 58 lbs. Instead of their being any shortage in *any* of these cargoes, there was an overage of 558 tons 58 lbs. equalling 3-4/100% (p. 2043). This overage would tend to indicate that the cargo loaded into vessels in Australia at least equalled the bill of lading and invoice weights.

The Southern Pacific Co. likewise discharged over, instead of under. But one shortage existed in the cargoes discharged by it. The bill of lading weight of the cargoes discharged aggregated 26,090 tons. The discharge weight was 26,111 tons 1998 lbs. The general overage (instead of a shortage) was 8/100% (p. 2043).

In justice to counsel representing plaintiffs in error, we believe it proper to state that they were evidently misled by the summary printed on page 2045 of the record, which, so far as the Hind Rolph Co. and the Southern Pacific Co. are concerned, incorrectly shows the overage to be a shortage.

The court might also consider the table showing discharge of split or partial cargoes (p. 2044). There the bill of lading weight represented 144,972 tons, the out-turn weight 145,011 tons 911 lbs., resulting in a net general overage of 27/1000%.

Nor can the weighing on a rising beam be charged with the shortage complained of—an advantage of ten or twenty pounds in every long ton is insignificant, and its effect vanishes in the coal dust that travels with the winds as they sweep by the scene of operations.

BRANCH OF CASE RELATING TO FRAUDULENT DRAW-BACK CLAIMS AND FRAUDULENT CONDUCT COMMITTED IN FURNISHING COAL TO TRANSPORTS AND OTHER GOVERNMENT BOATS.

Under the laws and regulations of the United States, where coal imported into this country, upon

which duty has been paid, is subsequently delivered to vessels engaged in foreign trade, flying the American flag, to be used by them as fuel, upon the presentation of proper claims commonly known as draw-back claims, supported by proper affidavits showing the importation of such coal and the payment of duty thereon, the owner of the vessel or vessels to which the coal is delivered is entitled to have refunded to him the duty previously paid upon the coal thus delivered. It is obvious, therefore, that the coal thus supplied to these vessels should be accurately weighed, to the end that the Government may not be required to refund any amount in excess of the sum actually paid as duty upon such coal.

In this portion of our brief we will undertake to point out to the court a part of the mass of evidence introduced during the trial in the court below, establishing beyond the shadow of a doubt that as a result of the conspiracy alleged in the indictment, draw-back claims were presented against the Government, upon which it refunded moneys purporting to represent moneys previously paid upon imported coal laden into American registered vessels engaged in trade with foreign countries, to be used as fuel, which, in fact, had never been paid, and that accounts were presented to and collected from the Government representing coal claimed to have been delivered to transports and other Government vessels, with which, in fact, they had never been supplied.

It is the claim of the Government, substantiated, as we will show, by affirmative and conclusive proof, that this situation was brought about by making and keeping false weights and returns of weights of coal supplied to these vessels, making it appear that larger quantities of coal were delivered to them than in fact they actually received.

METHOD OF COALING SHIPS.

While the various steps taken in coaling vessels will hereafter be described in detail, we believe it proper at this point to very briefly indicate the *modus operandi* by which the coal would leave its original place of discharge and finally find its way into the bunkers of the vessels to which it was supplied.

All of the vessels with which we are here concerned were supplied with coal by means of barges. When the Western Fuel Company first went into business in January, 1904, it was the owner of two barges. The remaining barges used by it in connection with its business were owned by the Western Transport Company. In July, 1904, one-half of the stock of this company was acquired by the Western Fuel Company, the other half standing in the name of Mr. Dunsmuir. The defendant John L. Howard was the president of this company; the defendants James B. Smith and Joseph L. Schmitt were directors. D. C. Norcross was its secretary. In 1907 the stock held by Dunsmuir was purchased

by the Western Fuel Company, it thus becoming the absolute owner of all of the capital stock of this subsidiary company. At a later date, the ownership of all of the barges was transferred to the Western Fuel Company, the Western Transport Company going out of business (pp. 231-233, 252).

In this connection, it might be proper to state that for carrying coal the Western Transport Company received 50 cents a ton, which was estimated on the weight of the coal, ascertained at the point of delivery from the barges to the vessels coaled by them (p. 233). The calculations were based upon delivery tags furnished by the defendant Mills, the figures upon which coincided with the entries in his books (p. 233).

The barges used in coaling ships would invariably take their coal from the pockets of the off-shore bunkers. At times they would take coal already deposited in these pockets by cleaning the pockets out; at other times, while a ship in which coal had been imported, was discharging, a pocket would be opened, and as the coal was dropped into the pocket from the cars after having been weighed, it would be discharged directly into the barge. Upon very infrequent occasions, a small quantity of coal was taken from the yard of the Western Fuel Company by means of dump-carts and deposited upon a barge. After the barge had received its cargo, it would be taken to the particular vessel, to the bunkers of which, coal was to be supplied. The coal would then be raised in buckets by means of a

hoist and dumped on to that part of the vessel immediately opposite the bunker holes through which the coal would be permitted to fall into the bunkers being filled. As the coal was taken from the barge in buckets, as will hereafter be shown, average weights would be taken. Upon these weights, the coal would be paid for by the owner of the vessel, and based upon these identical weights, draw-back claims would be presented. This same procedure would be pursued in supplying coal to transports and other Government vessels.

THE RECORDS OF THE WESTERN FUEL COMPANY THEMSELVES SHOW SALES OF IMPORTED COAL GREATLY IN EXCESS OF THE COAL RECEIVED.

If the claim advanced by the Government with respect to the second branch of this case is well founded, that is, that the alleged deliveries of coal to vessels having the right of draw-back, and to transports and other Government vessels were largely in excess of the actual and true weight of the coal thus delivered, it would necessarily follow that the records of the Western Fuel Company would show that it had apparently sold an amount of coal largely in excess of its actual or true weight. And logically, if, under the circumstances, the records of the Western Fuel Company show that although receiving only a certain quantity of coal, it nevertheless had sold a much larger quantity, that fact should be a controlling circumstance in connection

with other evidence tending to establish that the selling weights of its commodities were inaccurate, false and fraudulent. We have already shown that on April 1, 1906, the amount of foreign coal on hand was 25,258 tons (p. 2687). This was made up from a statement showing that on that date there were 12,748 tons 1022 lbs. located at San Francisco depot and 12,510 tons 40 lbs. located in the Oakland depot (pp. 130-3). According to the undisputed testimony of Norcross, this was all of the foreign coal in the possession of the Western Fuel Company on that date (p. 134). Between April 1, 1906, and December 31, 1912, including the coal on hand April 1, 1906, it had received from all sources, according to the out-turned or ascertained weight, being the weight upon which duty was paid, 2,138,831 tons 473 lbs. (pp. 2687; 2728).

Each month while engaged in business, the Western Fuel Company kept what is known as a monthly statement of coal received. One statement would relate to the Oakland depot, the other to the San Francisco depot. According to the witness Norcross, all coal received by it from all sources would be entered in either one of these two statements, he testifying:

“Q. Each of these statements indicating coal received at Oakland during a given month does show all of the coal received at the Oakland Depot for that given month?

A. That is right.

Q. Including all foreign coal?

A. Yes.

Q. And each of these sheets purporting to show coal received at San Francisco for each particular calendar month does show all of the coal received by the Western Fuel Company in San Francisco?

A. Yes.

Q. So that both of these sheets together do show all of the coal received by the Western Fuel Company in the State of California for each given calendar month?

A. Yes" (pp. 135-6).

So far as imported coals were concerned, these monthly statements designated their quantities according to the out-turn or discharge weight, that is, the weight upon which duties were paid.

Upon this subject Mr. Norcross testified:

"Q. So far as the imported coals are concerned, the weights are based not upon the invoice or bill of lading weight, but upon the custom-house weight or ascertained weight?

A. Upon the custom-house weight" (pp. 137-8).

(See also p. 141.)

These are the weights upon which the Western Fuel Company purchased and paid for the coal (pp. 138-9).

The weights of foreign coal shown by these statements to have been received by the Western Fuel Company between April 1, 1906, and December 31, 1912, corresponded with Table "A" United States Exhibit 125 prepared by Mr. Tidwell, excepting with respect to certain overages appearing on the face of the statements, to which we will hereafter

refer. During this same period of time, the Western Fuel Company kept in each of these depots a monthly record of all coal sold by it. These records taken together show all coal, including foreign coal, sold by it in California between April 1, 1906, and December 31, 1912, and likewise show the amount of coal on hand on December 31, 1912 (pp. 148; 183-5). From these records, the accuracy of which was not disputed, Special Agent Tidwell prepared a table showing the total quantity of imported coal sold by the Western Fuel Company between April 1, 1906, and December 31, 1912, the quantity of imported coal then on hand, and accounted for 326 tons of foreign coal which had been burned during the month of October, 1908 (pp. 314-15). This table is found on pages 2730 and 2732, volume VIII of the record.

An examination of this last table will show that, including coal on hand December 31, 1912, and the 326 tons of coal burned, according to the records of the Western Fuel Company, between April 1, 1906, and January 31, 1912 (both dates inclusive), it had sold 2,200,827 tons 1847 lbs. of imported coal, or 61,996 tons 1374 lbs. in excess of the amount purchased and received.

Upon these figures, as to which there is no dispute, if the ascertained or out-turn weight upon which duty was paid, was correct, and the wholesale selling price of this coal, as the evidence shows, was approximately \$6.50 a ton (p. 493), the profit derived by the Western Fuel Company as the result

of the fictitious and false weights upon which its foreign coal was sold, amounted to \$402,779 (p. 493).

**ACTUAL OVERAGE AFTER TAKING INTO ACCOUNT SHORTAGE
UPON IMPORTATION.**

In the statement of the first branch of the Government case it was pointed out that the difference between the invoice weight of cargoes of foreign coal imported into the United States, discharged by the Western Fuel Company, and the out-turn or ascertained weight, amounted to 20,720 tons 674 lbs. Upon this quantity of coal, the Government was defrauded out of import duties.

From the general overage of 61,996 tons 1374 pounds shown by the records of the company should be deducted the amount of shortage above stated because this quantity of coal was actually received by the Western Fuel Company, although unaccounted for in the payment of duties. If we deduct from the total overage, this shortage, there still remains a net overage of coal sold above the invoice weight of cargoes received, of 41,276 tons 700 pounds.

While this general overage covers its entire business so far as foreign coal is concerned, the record shows that the overage from the barges alone during this same period amounted to 33,223 tons 542 pounds (pp. 1204-5). That this fictitious or apparent excess of coal was due entirely to the fraudulent practices of defendants is conclusively shown.

ALL COAL DEPOSITED IN POCKETS OF THE OFFSHORE BUNKERS WAS ACCURATELY WEIGHED AND ITS POUNDAGE KNOWN.

We have already shown that no vessel was discharged opposite the offshore bunker, and that if coal was permitted to drop from the hoppers or over the sides of the cars when loaded, it would descend into the pockets of the inshore bunker. These facts, considered with the other evidence showing that the coal deposited in the compartments of the offshore bunker had gone on the scales and been weighed, should itself be sufficient to establish that all coal in the offshore bunker had been weighed. The testimony, however, demonstrates this almost to a mathematical certainty.

G. L. Hahn had been employed by the Western Fuel Company as an assistant weigher on the Folsom Street bunkers, his immediate boss being the defendant Mayer (pp. 262-263). According to him, a complete record was kept of all of the coal that went into each pocket of the offshore bunker. Upon this subject he testified:

"They always try to keep a record of what particular compartment or pocket in the offshore bunker the coal they have weighed is discharged into. I keep that record in my book. Only coal that is weighed goes into the offshore bunker,—that is, so far as I am concerned. Whenever coal is to be deposited in any of the pockets of the offshore bunker, it is first weighed and then dumped into the particular pockets or compartments. The weight of the coal which goes into the particular compartment or pocket of the offshore bunker is recorded in

this book by me. If coal was on the ship first, it would be weighed before being placed in the compartments or pockets of the offshore bunker. Sometimes coal that goes into the offshore bunker comes from the yard and sometimes from the ship. When it comes from the ship it invariably goes over the scales first and is weighed. A record is kept by me of the weight of this coal. This record shows me the particular compartments or pockets into which the coal thus weighed was dumped. The coal which comes from the yard is also weighed before being dumped in the offshore bunker; so that, as far as I know, all coal, whether coming from a vessel or from the yard, is first weighed before going into the pockets or compartments of the offshore bunker, and the weights are recorded in a book with reference to the pockets" (pp. 262-263).

David G. Powers, who had likewise been employed by the Western Fuel Company for some years and who succeeded his brother, Edward Powers, as assistant dock superintendent, also testified:

"I sometimes acted as assistant to Mayer in loading coal into the barges at Folsom Street after I left the Pacific Mail Steamship Company. This was only occasionally to relieve Mr. Mayer when he was at Mission Street. Upon such occasions I would handle the discharge of the coal into the barges myself. I certainly would check off the weight of the coal discharged into the barges. We weighed the coal and kept track of every pocket. We weighed the coal into the cars and kept track of the pockets and the trainloads that were emptied into said pockets. All the pockets were numbered. The engineer in charge of the train would get his orders as to what pocket to put the coal into from the weigher in the scale-house" (p. 702).

And according to secretary D. C. Norcross:

“Coal which finally finds its way into the offshore bunker has already been on the scales and has been weighed” (p. 246).

The testimony of the witness Waterdoll is likewise in point upon this subject-matter. He saying:

“I am familiar with the place upon those bunkers where coal was discharged after it was weighed. * * * When coal was discharged into these cars and brought over to the scales and weighed, it would sometimes be carried to the pockets of the offshore bunkers and sometimes to the yard pockets. I got my instructions where to discharge coal from Mr. Mayer. He would indicate to me which particular pocket of the offshore bunker to put the coal in. I would follow the instructions given me by Mr. Mayer. * * * (p. 1035).

Aside from this testimony, however, as has already been shown, it appears that it was the custom of the Western Fuel Company to keep a daily record of each ship that was discharged, showing the quantity of coal discharged each day and its several places of distribution. One of these records was identified by the witness Hahn, who in connection therewith testified:

“The weights that I got were first recorded in a tally book. From that tally book some person (at the end of the day) compiles the records, a sample of which is now shown me. I turn my accounts over to Mr. Mayer at the conclusion of the day’s work, and these daily report sheets—one of which is now shown me—are compiled by him from those records” (pp. 263-264).

It was admitted that the sheet referred to was one of a series of sheets similar in kind, filled out each day at the Folsom Street dock (p. 264). The document referred to is found at pages 2675 and 2685, volume 8 of the record.

This record shows the amount of coal in tons and pounds, discharged daily by each hoist, and its exact destination. It shows every pound of coal deposited in the offshore bunkers. It also shows the deposit of some of the coal upon certain barges, which was accomplished by opening up one of the pockets of the offshore bunker, thereby permitting the coal as it was dropped into the pocket to empty into the barge (p. 865). According to defendant Mayer it represents to a pound the disposition of each cargo of coal (p. 2008).

That the weight of the coal in these compartments of the offshore bunkers was both ascertained and known, was also shown by the evidence of defendant Mills, who in testifying that it sometimes occurred that boats and other craft received their coal direct from the offshore pockets, said:

“Q. What is the fact in regard to the coaling of vessels directly from those offshore pockets?

A. Well, we always weigh the coal when it is deposited in the offshore pockets, keeping a record of the weight of those pockets, and if a ship comes there, we give them that pocket and charge it up according to the weight that has gone in there” (p. 2103).

Upon this same subject the defendant Mayer, who kept track of weights upon the offshore bunkers, testified:

“When I am checking a ship I tell the men who run the cars to put such and such coal in Number 6 pocket or Number 8 pocket, or Number 10, as the case may be, and make a memorandum thereof on top of the list that I am working on. I do not in my office keep a record of the exact quantity of coal deposited in each one of these pockets. When the pockets are originally filled direct from the steamer I keep a memorandum, but I cannot always tell how much coal is in those pockets when they are partly tapped out.

Q. I know, but when a vessel is discharging you direct the men into what pockets to deposit the coal, do you not?

A. Yes, sir, but that coal is there to sell.

Q. And you keep a memorandum of the exact quantity of coal deposited from that particular ship into these several pockets, do you not?

A. Yes, sir (p. 2001).

* * * * *

Q. Does not your memorandum show the amount of coal deposited in each offshore pocket?

A. Yes, sir, but it is all charged to the offshore pockets.

Q. But does not your memorandum show the number of the pocket?

A. My memorandum does, yes” (p. 2002).

It seems that from time to time screenings would be deposited in the offshore bunkers. The defendant Mayer undertook to claim, but, as his cross-examination will show, without very much success, that upon a number of occasions these screenings

were not weighed (pp. 2010-2017), although he finally admitted that he would give instructions to put chalk marks on the cars carrying the screenings, indicating the number of loads deposited in the offshore bunkers, "just simply for curiosity" (pp. 2013-4). This testimony, however, was directly contradicted by the witness Mills, who followed Mayer upon the stand and who heard his testimony, Mills testifying:

"The largest proportion of the screenings of the Western Fuel Company since the fire of 1906 have gone into the barges. I should say also that account has been kept of the majority of the screenings thus delivered. It occasionally happens that screenings go into the barges without being weighed. I should think that would happen possibly 6 or 7 times a year. Screenings are never sent into the offshore pockets to be deposited or retained there unless they have been weighed" (p. 2101).

Irrespective of this testimony, however, when the court comes to examine the books kept by the defendant Mills, to which we will hereafter advert, it will see that every pound of coal taken off the vessel in which it was imported is accounted for, including screenings, when screenings were placed upon a barge or dumped into the offshore bunkers.

While, referring to the offshore and inshore bunkers, ordinarily the Folsom Street bunkers are directly referred to, this evidence applies equally to all of the bunkers utilized by the Western Fuel Company in the discharge and distribution of imported coal.

EXACT WEIGHT OF COAL LOADED INTO BARGES FROM OFFSHORE BUNKERS, ASCERTAINED AND KNOWN TO DEFENDANTS.

As we have already pointed out, the steamships, transports and Government boats with which we are here concerned were loaded by means of barges, into which the coal would first be checked and in which it would be carried to the particular vessel to which it was to be delivered.

The large bulk of the coal thus received by these barges for the purposes indicated, in fact practically all of it, came from the pockets of the offshore bunkers. An appliance known as a conveyor was located on the offshore bunkers, which could be moved to the mouth of each of its pockets. As soon as it was set, the chute was opened and the coal permitted to descend through the conveyor into the hold of the barge (p. 693). In order that the company might keep an accurate set of records, it was of course essential that the barges should be charged with the actual weight of the coal received by them. As no new weight was taken when the coal was discharged into the barges, the record showing the weight of the coal deposited in the pockets discharged, would represent the weight of the coal laden upon the barge. It was for this reason that an accurate weight of the contents of each pocket of the offshore bunkers was kept and recorded. And that such weight represented and was in fact the true weight of such coal, was recognized, not only by the defendants but by every official and employee

of the Western Fuel Company. This situation is clearly shown by the evidence. Upon this subject the witness Hahn testified:

“It sometimes happens that while a boat is discharging into these hoppers opposite the ship and located over the inshore bunker, there is a barge loading at the offshore bunker. The coal discharged into the barge is taken from the pockets or compartments of the offshore bunker. It is done in this way: Take for instance pocket 17, there may be 50 tons in that pocket, and we are going to feed the barge from that pocket. We empty the 50 tons out on to the barge. We have a record of how many tons there are in the pocket, also the pounds. If you wish to get 100 tons of coal upon a particular barge, and there are only 50 tons in a particular pocket, you empty out that coal first, and then bring more coal into the pocket, and from the pocket on to the barge” (pp. 266-267).

The witness was here describing an occasion when the coal in the pocket would be discharged into the barge, the mouth of the pocket left open and additional coal dropped into the pocket, which was then permitted without interruption to descend into the barge.

For four years prior to July, 1911, Edward Powers had been assistant dock superintendent under the defendant Mills. For a year prior to that time he had been a hatch tender, and before that had been employed in other capacities (pp. 855; 857; 860; 869). Touching the weight of coal discharged into barges, this witness testified:

“Q. So far as the coal contained in the pockets of the offshore bunker is concerned,

what knowledge have you upon the subject, as to whether the coal had or had not been weighed?

A. It had been weighed.

Q. It had been weighed?

A. To the best of my knowledge.

Q. Well, now, from whom would you get the weights of the coal that came out of the offshore pockets, or pockets of the offshore bunkers?

A. Edward Mayer.

Q. The defendant Mayer?

A. Yes.

Q. Did he ever at any time tell you—did he ever tell you that the figures which he gave you representing the weight of the coal coming out of the pockets of the offshore bunker, were not correct?

A. He did not.

Q. What statement, if any, did he make regarding the accuracy of those weights?

A. He just left the weights on the desk and walked away.

Q. By the way, when a barge would go over there ordinarily for coal to the offshore bunker, would they clean out a pocket?

A. Yes.

Q. By the way, do you know how much coal would ordinarily be contained in each pocket or compartment of the offshore bunker on the Folsom Street dock?

A. They were different.

Q. You say they were different?

A. There were different amounts.

Q. What would be the approximate weight for one pocket, as an average?

A. 45 tons, or 50.

Q. And they run up, sometimes, to 70 tons?

A. I think so.

Q. When a barge, for instance, would want 500 tons of coal, would you, or rather, in loading that quantity of coal upon the barge, would you

discharge one pocket after the other, until you got approximately that amount, or until all of the pockets that were open were discharged?

A. I believe they would tell Mayer what pockets to put into the barge.

Q. *And you would get the exact weight of the coal contained in those pockets?*

A. Yes.

Q. When the coal was discharged from a ship which was discharging at the Folsom Street dock, or at any other dock, would the coal first be weighed before you would get it?

A. Yes" (pp. 876-877).

This witness also testified that whenever a barge would be loaded from one of the pockets of the offshore bunker, *the pocket would be entirely cleaned out*, and that when coal was being directly discharged into a barge by means of a pocket, it first went upon the scales and would be weighed (p. 878).

The witness David G. Powers also testified:

"When I was assistant to the defendant Mills I frequently attended to the coaling of the barges and I often accompanied a barge over to the Folsom Street dock for the purpose of taking on coal. I would get the weights of the coal from the weigher, Mayer. *I always cleaned a pocket out when we were loading a barge from the offshore bunkers. A barge would be charged exactly with the weight of the contents of the pockets.* The weights would be given to Mr. Mills by the defendant Mayer" (pp. 701-702).

See also testimony of L. C. Mills (p. 2103).

As to this matter, the witness Edward Powers testified:

"Sometimes the barges which would coal vessels would get their coal direct from a steamer,

sometimes from the yard, and sometimes from the offshore and inshore pockets. The pockets would be weighed. I believe the coal would also be weighed when it would be brought to us in carts. On those occasions it would be weighed on the Miller scales, which were located in front of the office at Steuart and Harrison. *With the exception of a very few instances the coal which went into the barges was weighed before it reached the barges, so that I would know the exact quantity of coal that was checked into the barge.* It was not a general practice to bring coal from the yard to the barge. That was done on infrequent occasions. That yard was located on the opposite side of the street. When coal was brought from the yard to a barge, it would be weighed over the track scales of the Western Fuel Company, and a record would be kept of that coal; *so that the weight of the coal would be taken whether it came from the inshore bunker by cart, or from the yard by cart, or directly over the side of a ship, or from the pockets of the offshore bunkers*" (pp. 865-866).

And again:

"Q. During the time that you were assistant to the superintendent, keeping the records, and furnishing the defendant, Mills, with reports from time to time, of course you knew, did you not, the exact quantity of coal which was checked into the barge, and the exact quantity of coal that was checked out of the barge?

A. I did, by the reports that were given to me.

Q. By the reports that were given to you?

A. Yes.

Q. And you knew, did you not, that at least in a great number of cases, there was more coal taken out of the barge, so far as weight was concerned, and so far as your records were concerned, than was put into the barge?

A. So far as the records were concerned, yes" (pp. 873-4).

Norcross himself admitted that reports showing the coal discharged and taken out of barges would be sent to his office and given to the defendant, James B. Smith (pp. 200-2-3).

Whatever doubt, however, may have been created by the uncertain and equivocal testimony of the defendants, Mayer and Mills, upon the subject of keeping records of weights, both of whom realized that if the weights of the coal with which the barges were charged were accurate it would be futile to attempt to account for the overage developed at the point of discharge, for the reasons assigned by the experts, such doubt was dispelled and the atmosphere clarified by the testimony of A. J. Schultz, foreman of stevedores for the Western Fuel Company, who, upon cross-examination, when testifying on behalf of the defendant, said:

"When I was discharging coal from the pockets of the bunkers into my barges, Mr. Mayer would tell me how much coal was in the pocket if I requested him. He gave me generally on a blank card the number of the pockets. Sometimes Mr. Mills does that. Sometimes they also give me a memorandum showing the amount of coal I am to discharge; sometimes they do not. It is very seldom that I receive such a memorandum, however. We have a certain book relating to the offshore pockets showing the amount of coal in each pocket. I could see that book if I asked for it. It is kept either by Mr. Mayer upstairs or in the office. Mr. Mayer usually keeps it upstairs because he

makes notes in it as he fills the pockets. I have also seen that book in the weighing office and have seen Mr. Mills take it up occasionally to look for certain pockets'' (p. 1345).

The failure of defendants to produce this book, or account for its absence, is at least significant.

As the exact quantity of coal contained in each pocket of the offshore bunker was known, and as in each instance when coal would be taken from a pocket of the offshore bunker by a barge, the pocket would be cleaned out, and as in the few instances when coal would be supplied to barges from the yard or inshore bunkers it would first be weighed, it necessarily follows that every time a barge took coal its *exact weight* was known to the Western Fuel Company and those of its employees who supervised this branch of its business.

Without reference to this explanation, however, it must be apparent that as a matter of bookkeeping, the exact weight of all coal checked upon barges from the wharf bunkers and the yard, were kept. That was the branch of the Western Fuel Company over which Mills had no jurisdiction. When coal was discharged into the inshore bunkers or the yard, that branch of the business was charged by Mills with receiving this coal. If any part of this coal found its way back into that part of the business controlled by Mills, the records of the Western Fuel Company would necessarily have to show that fact.

**BOOKS KEPT BY DEFENDANT MILLS DEMONSTRATE THE
TRUE WEIGHT OF COAL LADEN UPON BARGES, AND THAT
THE WEIGHTS OF COAL DISCHARGED FROM THE
BARGES WERE FALSE AND FRAUDULENT.**

Each day as foreign coal would be discharged from a ship, whether located at the Folsom Street dock, the Mission Street dock or elsewhere, a complete and detailed statement would be prepared by the defendant Mayer, and by him furnished to the defendant Mills, showing the quantity of coal discharged on that particular date and the place, or various places, where such coal was finally deposited. If a portion of the coal discharged had been transmitted to and deposited in the yard of the Western Fuel Company, that fact, with the recorded weight of the coal, would be given. The weight of that portion of the weighed coal which went into the inshore, or wharf bunkers, would also be furnished. The same would be true of the offshore bunker. And if a portion of the coal was discharged through a pocket of the offshore bunker directly upon a barge, or brought from the yard or wharf bunkers, which was very seldom, information of that fact would be given Mills, together with the weight of the coal taken into the barge.

In addition to these records, however, as has already been shown, the defendant Mayer kept in his office on the bunkers a detailed statement, showing the exact weight of the coal deposited in each pocket of the offshore bunker, so that if a barge desired a particular amount of coal, upon applica-

tion to him a particular pocket would be tapped and, as already testified to, would be cleaned out.

From the records thus furnished to him by the defendant Mayer, the defendant Mills kept in his own office a diary, in which he entered on each day the name of the ship discharging, the quantity of coal discharged, its destination, and the weight of the coal deposited in the inshore and offshore bunkers or upon the barges of the Western Fuel Company. These diaries in and of themselves furnish convincing and unanswerable proof of the guilt of defendants.

EXPLANATION OF ENTRIES CONTAINED IN BOOKS KEPT BY DEFENDANT MILLS.

Because of the importance of the entries contained in the diaries thus kept by the defendant, Mills, it is essential that a very brief explanation be made of the system pursued by him in keeping these books.

Preliminarily it may be said that they account for every pound of imported coal discharged by the Western Fuel Company and its primary distribution (pp. 317-436). As was heretofore pointed out, the local trade was supplied from its inshore bunkers (also known as wharf bunkers) and its yards. With this branch of the business, neither the defendant Mills nor the defendant Mayer had any concern. So far as this particular department of the company's business was involved, their duty ended when they

accounted for the weighed coal discharged into the wharf bunkers and yards. But, for the coal deposited in the offshore bunkers or laden upon barges, the defendant Mills was responsible until it reached its ultimate destination, which would be the vessels to which it would be sold and delivered.

An examination of these diaries, among other things, will show that in them accounts were kept and entries made disclosing the following facts:

1st. The name of each vessel carrying foreign coal, discharged by the Western Fuel Company.

2nd. The weight of all coal discharged each day from these importing vessels determined, however, by the out-turn or ascertained weight, and the out-turn weight of the total cargo when the discharge was completed.

3rd. The particular portions of the plant of the Western Fuel Company in which the coal thus discharged would be distributed after it had been weighed, including the out-turn weight of the coal deposited in each place.

4th. The weight of the coal checked into or laden upon the barges of the Western Fuel Company, and the names of such barges.

5th. The claimed weight of the coal discharged from the barges and delivered to the vessels supplied with coal.

6th. The character of the coal going into the barges, and if screenings, the exact amount thereof by tons and pounds.

7th. The number of the voyage of the ship in which the coal is imported.

8th. The names of the vessels supplied with coal and to which the coal would be delivered.

The entries will also show the invoice weight of each cargo of imported coal, and when the out-turn or discharge weight has been ascertained, whether the cargo ran "short" or "over," and the respective amount of such shortage or overage.

The barges would be charged with the out-turn weight of the coal, that is, the weight ascertained at the time the imported coal was being discharged from the vessel in which it was brought here. As against this intake or charged weight, the barge would be credited with the amount of coal taken out of her and discharged into vessels to which coal would be delivered. These credits were derived from records of weights kept while the coal was being discharged from the barge into the vessel being coaled. When the barge would be finally cleaned out, that is, when all of the coal laden upon her was finally discharged, a computation would be made between the amount of coal received by the barge and the amount checked out. If more coal was checked out than was received, this would be designated as an overage in the books of Mr. Mills. If, on the other hand, a shortage occurred, that fact would be designated, together with the amount of such shortage. A shortage in the coal discharged from the barge, however, but rarely hap-

pens, such shortages being represented by less than 1% of the clean-ups; an overage was the invariable result, being represented by 99% of the clean-ups. The extent of these overages will be dealt with later.

That these books accounted for every pound of coal checked into and taken off of each barge is undisputed. Upon this subject Tidwell testified:

“Q. It is a fact, is it not, Mr. Tidwell, that in those books every pound of coal that finds its way into the barge is traced and found to be discharged?

A. Yes.

Q. As well as some 66 tons more?

A. Every pound that went into the barge is shown by the record. If it was taken from the yard, as I can find an instance here where coal was taken from the yard and placed into the barge—there does not seem to be one at the present time, but it will show the amount taken from the yard or any other place, both tons and pounds, tracing it down to 40 or 100 pounds” (p. 322).

By way of further explanation, it is proper to state that when a barge is loaded with coal the usual practice would be not to completely discharge her before taking on additional coal. For instance: 500 tons might be laden upon a barge; 300 tons of this coal would be discharged into a vessel. The barge would then take on an additional quantity of coal and would be discharged only in part. This system would sometimes be pursued for several weeks before the barge would be finally cleaned out and her entire cargo discharged. It would not be until the clean-up or final discharge occurred that it could be

told with any degree of certainty whether there would be an overage, and if so, its extent.

There is also another feature connected with these books which should likewise be briefly elucidated. So far as the in-take of each barge is concerned, the amount of coal laden upon her until her final discharge is carried forward from day to day. For illustration: If on the first day 500 tons were taken by her from the offshore bunker, on the second day 600 tons from the same bunkers, and on the third day 500 tons from the steamship "Thor," the third day's entries would be as follows:

Offshore bunkers	500 tons
Offshore bunkers	600 tons
Ex "Thor"	500 tons,

and this procedure would be pursued until a clean-up occurred. In other words, on the day of the final clean-up the total coal previously deposited upon the barge would be shown. So far as here out-turn was concerned, totals alone were indulged in. For instance, if on the first day she delivered 400 tons to the "Siberia" and on the second day delivered another 400 tons, the entries made on the second day would show the total delivered to that date, to wit, 800 tons. The daily discharge would have to be obtained by subtraction. For the further purpose of illustration, dealing with a concrete case, a clean-up occurred on the barge "Nanaimo" on Friday, January 27, 1911, when it was ascertained from the records showing the coal received and discharged by

her, that she had discharged 37 tons—1544 pounds more than she had received.

On February 4, 1911, she took coal from the offshore bunkers on two occasions, and also took coal from the steamship "Thor," then discharging, which was done as has already been explained, by opening up one of the offshore pockets and letting coal drop from coal cars into the pocket, and from the pocket into the barge. She first took from the offshore bunkers

14 tons 460 lbs.

Then again from the same bunker

she took	369	"	920	"
and from the "Thor",	412	"	2090	"
	<hr/>		<hr/>	
aggregating in all	796	"	1230	"

On the same day she discharged into the Steamship "Siberia",

237	"	360	"
559	"	870	"

On February 6, 1911, without taking on any more coal, she discharged into the steamship "Siberia"

268	"	1880	"
-----	---	------	---

leaving a balance on hand of

290	"	1230	"
-----	---	------	---

This last item of discharge into the "Siberia" appears in the diary as

505	"	1340	"
-----	---	------	---

which figure represents the total coal discharged into the "Siberia" up to and including that date, the figures being carried as totals, as already explained.

If we subtract from the 505 tons 1340 lbs., representing the total coal discharged into the "Siberia" to and including February 6, 1911, the 237 tons 360 lbs. previously discharged, we obtain the net weight of the coal delivered to the "Siberia" on February 6.

On February 7, 1911, she again discharged into the "Siberia" without taking on any further coal, her total discharge being 663 tons 850 lbs. leaving a balance on hand, assuming the weights to be correct, of

133	"	380	"
-----	---	-----	---

On February 8, 1911, she again discharged into the "Siberia", making a total of coal thus discharged, according to the weights kept of

775	"	1656	"
-----	---	------	---

leaving a balance on hand of

20	"	1814	"
----	---	------	---

On February 11, 1911, she took from the offshore bunkers

56	"	1900	"
----	---	------	---

from the steamship "Puritan",

560	"	1780	"
-----	---	------	---

which, with the coal already charged against her since the last clean-up aggregates

1414	"	430	"
------	---	-----	---

On the same date she again discharged into the "Siberia", making a total discharge into her of

775	"	1656	"
-----	---	------	---

and also discharged into the "Pennsylvania"

75	"	100	"
----	---	-----	---

<hr/>		<hr/>	
850	"	1756	"

or a total discharge to date of

leaving a balance to her credit of 563 tons 914 lbs. which represented the difference between the amount with which she was charged, and the amount which she was supposed to have discharged, although that quantity of coal was, of course, not on the barge.

On February 14 she continued to discharge into the "Pennsylvania" the difference between 424 " 1744 "
her total discharge to and including that date, and 75 " 100 "
which was previously discharged, viz.: 349 " 1644 "

Her total discharge to and including that date was 1200 " 1160 "
leaving a balance to her credit of 213 " 510 "

No coal was then taken out, or discharged from her until March 7, 1911, on which date she again took from the offshore bunkers 518 " 30 "
making a total receipt of coal, to and including that date, 1932 " 460 "

On that date she discharged into the "Asia" 503 " 1364 "

Her total discharge to and including that date, which included deliveries of coal to the "Siberia", "Pennsylvania" and "Asia" aggregated 1704 " 284 "
leaving a balance to her credit of 228 " 176 "

On February 8, she continued to discharge into the "Asia", making a total to and including that date, of 732 tons 604 lbs. and on March 1, she discharged the balance of her cargo into the "Asia", totaling in all, 788 " 1436 "

As the result of this last delivery, no further coal was left in her, consequently, what was known as a "clean-up" occurred.

From these figures it will be seen that upon the weights taken, she discharged 56 tons 2136 lbs. more coal than she received.

Her last day's entries are as follows:

"Thursday, March 9/11

Ex. Nanaimo Segs. Wellg. Slack Rich. a/c

	off-shore bunkers,	14 tons 460 lbs.
"	"	369 " 920 "
"	Thor	412 " 2090 "
"	off-shore bunkers	56 " 1900 "
"	Puritan	560 " 1780 "
"	off-shore bunkers	518 " 30 "
		<hr/> 1932 " 460 "

Siberia 1775 tons 1556 lbs.

Pennsylvania 424 " 1744 "

Asia 788 " 1436 " 1989 " 356 "

Over 56 " 2136 "

(See diary 1911 United States Exhibit 113.)

The same procedure would be pursued respecting the discharge of an imported cargo of coal. The quantity of coal discharged the first day is shown. On the next day an entry would be made showing the total coal discharged upon both days. To ascertain the quantity of coal discharged on the second day, the amount removed on the previous day would have to be deducted from the total discharge shown by the diary. This practice would be followed until the entire cargo had been discharged. A comparison would then be made between the invoice weight and the out-turn or discharge weight, and the overage or shortage, as the case might be, entered. In addition to the weights, entries would be made showing the various points of distribution of the coal.

During the trial in the court below, the discharge of the steamship "Thor" was traced in the books of the defendant Mills and every pound of coal that was removed from her and weighed, was accounted for. For the benefit of the jury, the figures relating to the discharge of this cargo, and its distribution, including the delivery to vessels of all of the coal which had been deposited in the off-shore bunker and on barges, were reproduced and enlarged. Upon this reproduction, Mr. Tidwell, by whom it was made, was examined at length (pp. 420-436). The reproduction of these figures was made upon large sheets used in the court below, which have been transmitted to this court, and which are available in connection with the testimony of Mr. Tidwell

relating thereto. In making this reproduction, as explained by Mr. Tidwell, entries relating to the discharge of vessels other than the "Thor" are omitted, as are also omitted entries made in the diaries being illustrated, on dates upon which none of the coal discharged from the "Thor" was laden upon barges or delivered to steamers being coaled. The purpose of the reproduction was to demonstrate to the jury that every pound of coal discharged from importing vessels was shown by these books thus kept by the defendant Mills.

TABLE DISCLOSING OVERAGES ON BARGES.

From the books kept by the defendant Mills, the consumption entries and draw-back entries, and the records of the Western Fuel Company in evidence, another table was compiled by the witness Tidwell showing all coal laden upon barges, its ascertained weight at that time, its ultimate disposition, and its alleged weight at point of delivery to other vessels. This table is found at pages 2733, 2813 and 2810, volume VIII of the record. Summaries resulting from the figures tabulated are found on pages 2811-2813, volume VIII of the record. During the trial, it developed that through the failure of Mills to carry forward balances in certain instances, the table did not correctly show the total amount of coal laden into and discharged out of these barges. Immediately thereafter, the books were again examined and the necessary corrections made. While

these corrections disclose that more coal had been laden into, and taken out of the barges than was shown by table "C", according to Tidwell, the overage or amount of coal claimed to have been discharged from the barge in excess of the amounts received was in no wise affected:

"Q. I would like to have you explain, Mr. Tidwell, very briefly, because I only want to ask you this one question on that subject, how it came about that Table C did not contain all of the deliveries of coal to the barges?

A. For the simple reason that in preparing the table, I accepted the records of Mr. Mills as being correct, and took the totals at the date of the out-turn, or the date of the clean-up, as it is called; I accepted the total receipts as being correct, and also the total out-turn as being correct, as well as the total overage.

Q. Now, let me ask you this question: Irrespective of the question of percentages, would any single one of these inaccuracies called to your attention by Mr. McCutchen, or all of them together, in any way affect the total tonnage of excess so far as quantity is concerned?

A. You mean as to the amount received and discharged?

Q. Yes, as to the amount of overage.

A. No, sir.

Q. In other words, it simply affects the percentage; is that correct?

A. The percentage on a particular barge.

Q. The percentage upon a particular barge?

A. Yes, and it would also affect the total percentage.

Q. That is, the total percentage so far as the excess quantity of coal delivered from the barges is concerned?

A. Yes.

*

*

*

*

*

*

Q. Is it not true that none of these alleged inaccuracies in any way affects that total result?

A. None whatsoever'' (pp. 635-6).

The witness further testified that these figures in no way affected the general overage in the entire business done by the Western Fuel Company represented by the difference between the total coal received and total coal sold (p. 637).

In this table in each instance, the total quantity of coal laden upon a barge from the time she commences to take coal until she completely discharges her cargo, or, in other words, a cleanup occurs, is shown. It also shows the vessel, yard or receptacle from which the coal was received by the barge, the vessel or vessels to which the coal thus laden upon the barge was delivered, the total amount which it is claimed was discharged from the barge, the overage representing the quantity of coal claimed to have been discharged from the barge above the actual weight of the coal checked into her, the amount of coal upon which no draw-back was claimed, due to the fact that part of the coal discharged from barges was delivered to vessels not entitled to draw-backs; also the amount of coal delivered to vessels upon which draw-back claims were made and paid, and also the amount of coal which it was claimed was laden upon army transports and revenue cutters (p. 331).

The table further shows the number of the draw-back entry.

It was also testified to, as has already been shown, that the weights charged to the barges, as shown by this table, represented the ascertained weights, or the weights upon which duties were paid to the Government (pp. 331-2).

Without desiring to unnecessarily intrench upon the time of the court, we believe it proper to explain at least two of the entries appearing in this table.

The first barge referred to is the "Melrose" under date January 2, 1906. According to the table, there was loaded into her from the steamer "Tellus", according to ascertained weight, 900 tons 1336 lbs. This cargo was completely discharged into the vessel "California". According to the record of the weights then taken, as shown by the books kept by the defendant, Mills, she discharged into the "California" 909 tons 407 lbs., being over 8 tons 1311 lbs. In other words, she discharged 8 tons 1311 lbs. more than she received. Upon this entire amount a draw-back claim was presented, it being fraudulent to the extent of 8 tons 1311 lbs. (p. 2734).

The next entry to which we desire to direct the court's attention is in connection with the barge "Ruth" which commenced to take coal on March 13, 1906 (lower part of p. 2737). In this instance the barge took on coal upon a number of occasions, the aggregate weight of which was 4293 tons 1240 lbs. The places from which this coal was obtained and the exact weight of the coal, are shown. Out

of this cargo, she delivered coal to ten steamers, seven of which enjoyed the benefit of draw-back. The total quantity of coal claimed to have been delivered was 4485 tons 302 lbs., constituting an overage of 191 tons 1302 lbs.

RECORDS OF BARGE RECEIPTS AND DELIVERIES, 1904-1905.

The diaries kept by the defendant Mills introduced in evidence also cover the years 1904 and 1905. From these two diaries another table was compiled, similar in all respects to Table C. This table was United States Exhibit 130 and is found on pages 2827-2866, volume VIII of the record. During these two years 207,309 tons 952 lbs. of foreign coal were delivered to barges, and 217,354 tons 2099 lbs. discharged, resulting in an overage of 10,045 tons 1147 lbs. Upon this overage, the Government refunded duty on 6927 tons 1812 lbs. 332 tons 227 lbs. of this overage was claimed to have been laden on United States transports. The loss of the Government alone, during these two years represented by this table amounted to \$6972.63 (see pages 2865-6).

The records showing shortages from importing vessels during these two years were not introduced because they were destroyed in the fire of 1906.

INACCURACIES IN BOOKS KEPT BY MILLS IN NO WAY AFFECT RESULTS.

In the brief filed by plaintiffs in error, it is claimed that because of Mills' failure in some instances

to carry forward in his books from day to day, until an overage would be computed, the total quantity of coal received and discharged since the last computation was made, his entries were entitled to but little reliance. The claim thus made is destitute of merit. Failure on the part of Mr. Tidwell, in compiling Table "C" to take into consideration these totals, as has already been persuasively commented on, only affected the percentage of specific overage in the instance where such irregularity existed, and to a very slight, almost negligible extent, the general percentage of total overage. After it was ascertained that in some instances these totals had not been carried forward, Mills' books were exhaustively re-examined and a table prepared by the witness Costello, in which is set forth the total intake and discharge of each barge in every case where the totals were dropped by Mills. The accuracy of this table was not disputed. It appears on page 1206 of the record. The general percentage is reduced from 5.89 to 5.57.

Percentages of overage in specific cases where such percentage equalled or exceeded 9%, based on the total coal delivered to the barge, were prepared after the books of Mills had been re-examined and the table of corrections above alluded to, prepared and completed (see table of percentages, p. 1217).

This is made clear by Costello's testimony, he stating:

"None of the discrepancies or omissions to which I have testified on cross-examination,

would in any way affect the individual percentages in the cases of overages I have given as exceeding 9 per cent" (p. 1231).

**NET RESULTS SHOWN BY RECORDS KEPT BY
DEFENDANT MILLS.**

According to Table C already referred to, between April 1, 1906, and January 1, 1913, 563,759 tons 724 lbs. of coal were laden upon these barges, and 596,982 tons 1266 lbs. discharged. As corrected, they show that 595,492 tons 102 lbs. of coal were placed on the barges, and 628,715 tons 644 lbs. discharged. These corrections simply increase the quantity of coal taken on and discharged, and in no way affect the amount of overage, or the accuracy of any of the other figures shown in Table C. The general percentage of overage resulting from these figures as corrected was 5.57 per cent (pp. 1201-6).

It therefore appears that according to the weights taken at the time the coal was discharged from the barges into the vessels coaled by them between April 1, 1906, and December 31, 1912, *33,223 tons 542 lbs.* of coal were claimed to have been discharged into these vessels in excess of its actual weight. On page 2811, volume VIII, is a summary showing, by years, the apportionment of this overage to vessels without benefit of draw-back, with benefit of draw-back, and United States vessels. On page 2812 is a statement showing the amount of moneys refunded by the Government upon this

overage in excess of the duties received by it, also showing the amount paid by the Government upon these excess weights for coal supplied to Government vessels, the total amount being \$21,792.26. The court will notice that a portion of the drawback is at the rate of 67 cents and a portion at the rate of 45 cents. The first was under the Tariff Act of 1897 and the second under the Tariff Act of 1909.

On page 2813 is a grand summary showing the excess amount of coal claimed to have been discharged from barges over amount laden on same, the overage with benefit of draw-back and that without benefit of draw-back, that portion of the overage claimed to have been placed upon Government vessels, and the amount of money lost to the Government by reason of this overage.

**GENERAL AVERAGE IMMATERIAL—SPECIFIC CASES OF
OVERAGE CONTROLLING.**

As in the instances of shortages on incoming cargoes, defendants seek to shield themselves from culpability and to avoid the legal consequences resulting from their criminal conduct through the medium of a general average. It is asserted by them that because the general average computed upon the total amount of coal handled by the barges is 5.57 per cent, criminality cannot be imputed to them. To this character of argument we make the same response as was made in the case

of shortages. Here, however, the situation is greatly emphasized and exaggerated. So far as this phase of the controversy is concerned, it cannot be successfully asserted that the coal laden upon the barges was merely estimated by ship's scales, or by comparisons, nor can it be claimed that because of the length of time coal remained upon barges, by oxidation or increase in moisture content, the weight of its cargoes could have been substantially increased. Even their own experts could not account for the increase of coal located upon a barge for a few days, or for a couple of weeks, beyond $1\frac{1}{2}$ per cent. In this case, as we have already seen, according to the weights kept by defendants, coal laden upon barges, within not more than two weeks, and in many cases within a few days, would increase in weight anywhere from 3 and 4 per cent, to 20, 30 and sometimes 40 per cent.

For the purpose of convenience, after Table C had been carefully re-examined, and its inaccuracies cured, a table was prepared showing certain of the larger overages and the time intervening between two cleanups. This table will be found on pages 1217-1218 of the record. In no case where the percentage of overage was less than 9 per cent is any reference made thereto in this table. As to this the witness Costello testified:

“At the time when I was comparing the items contained in U. S. Exhibit 125, Table C, with the items contained in the books kept by defendant, Mills, I likewise compiled a table for showing overages which exceeded nine per cent in the discharge of barges.

In this table I have indicated a number of items where the percentage of overages upon the clearances of the barge exceeded nine per cent" (p. 1216).

An examination of this table will show that in a number of instances, the period of time elapsing between cleanups did not exceed more than five or six days. In this connection the court will also remember that this does not indicate that all of the coal was laden upon the barge on the first date and taken off on the last. In the large majority of these cases the coal was laden upon the barge at different dates and discharged on different dates. It was thus kept constantly in motion. Because of the frequency with which the barges took on and discharged coal it was but seldom that any particular quantity of coal remained upon the barge for any considerable length of time.

For instance only a week elapsed between two cleanups on the barge "Nanaimo" (February 3-10, 1906), and the increase in weight of the coal handled amounted to 32.5 per cent.

Again, on the barge "Ludlow", seventeen days elapsed—May 13-29, 1907, resulting in an increase of 20 per cent.

Again, the barge "Theobald", having coal on her for a period of but five days—February 13-18, 1908, had an increase of $16\frac{2}{3}$ per cent. The barge "Comanche", five days,—May 16-21, 1908, had an increase of 23.5 per cent.

The barge "Theobald", handling coal for three days—December 9-11—resulted in an increase of 42.6 per cent, and again, the same barge, while taking in and delivering coal upon three other days,—May 23-25, 1912—had an increase of 40 per cent (see table, pp. 1217-18).

It is of course not claimed that every time a bucket was weighed, false weights were taken, but that such acts were frequently indulged in, cannot be seriously denied. It is because of these instances, the result of criminal conduct due to the conspiracy alleged, that the general average is created; without them, the average, if any, would scarcely be noticeable. No rule of evidence, nor principle of jurisprudence will justify one in avoiding the consequences of a series of criminal acts, by proving that upon other occasions, criminal conduct was not indulged in.

**ACTUAL WEIGHT OF COAL ON BARGE FURTHER DIMINISHED
AND ACTUAL OVERAGE INCREASED BY ITS USE AS FUEL.**

The buckets in which the coal would be discharged from the barges were hoisted by steam engines located upon each barge. The fuel consumed by these barges, sometimes in constant action both day and night, was taken from the coal checked into and laden upon the barge. This situation is described by the witness Edward Powers, who testified:

“While coal is being discharged from a barge into a vessel, coal is of course consumed

upon the barge for the purpose of generating steam. That coal is obtained out of the hold of the barge, and is a part of the cargo of the barge.

Q. Is it or is it not a fact that all of the coal consumed from time to time upon the barges for the purpose of generating steam is taken from the cargo that is placed upon the barge, either from the offshore bunkers or from some ship or from the yard?

A. It is.

Q. Six or seven tons a day are consumed on these barges during the process of unloading. I believe the 'Melrose' consumes more coal than any of the other barges. I would say she would use eight tons a day" (pp. 976-977).

And that in the entries made by the defendant Mills in his books no account was kept of the coal thus consumed, was likewise testified to by this witness, his statement being:

"Where the records of the defendant Mills show that a certain quantity of coal was laden into the barge and a certain quantity of coal discharged from the barge, and that an overage occurs, the coal consumed by the barge is not calculated in the overage" (p. 977).

The books kept by the defendant Mills show that these barges were almost constantly in action. From time to time at least seven barges were in use (p. 121). If coal were being discharged from them only fifteen days out of each month, and about seven tons of coal consumed daily, the quantity of coal used as fuel each month in these barges would aggregate about 735 tons. As this amount of coal or whatever the quantity was, would have

to be deducted from the actual weight of the coal laden into the barges, the court will readily see that the weights representing barge overages would be proportionately increased each month, resulting in a substantial increase in the general percentage of overage. If the quantity of coal consumed for fuel on each barge were taken into consideration in estimating the overage at each clean-up and the specific percentage of overage caused thereby, the amount of overage, as well as the percentage, would be in many instances very greatly enlarged.

OVERAGES IN BOOKS KEPT BY MILLS INDICATES CLEANUP OF BARGE.

The significance of these large overages existing in concrete cases on barges was thoroughly understood and appreciated by defendants.

Realizing, therefore, how impossible it was, on any legitimate or logical theory, to account for the overages shown by the books kept by the defendant Mills, this particular defendant on direct examination undertook to claim that such overage did not indicate that a cleanup had occurred or that practically the whole of the barge's cargo had been removed (pp. 2105-6). Even if this testimony had not been contradicted, in the face of the entries contained in the books, the jury would have been obliged to reject it as entirely unworthy of belief. Whatever defendants might claim in this

regard, or whatever Mills might have testified to, the great preponderance of the evidence establishes the fact to be otherwise. The entries appearing in the books indicating overages could only have been made when the barge was cleaned out because in a number of instances the records will show that more coal would be apparently discharged out of the barge than she had received, and yet before any final entry indicating an overage would be made, additional coal would be checked in, and a larger quantity checked out.

Mr. Tidwell, an experienced accountant, in explaining an overage appearing in Mills' books, testified:

“Q. That is on the table it appears under the date of January 30th?

A. Yes, that is the date of the cleanup of the barge.

Q. Will you just indicate to the jury what you mean by the cleanup of the barge?

A. When all the coal has been checked out of the barge.

Q. And until that is done, of course, it is impossible to tell whether there is an overage or shortage upon the barge?

A. Yes.

Q. And the reason for that is that it equally occurs that the barge would take on, we will say for the purpose of illustration, 1000 tons of coal on one day and then discharge a part of that cargo and come back and take on 500 tons and then make another discharge and take some other coal on; until all of the coal was removed from the barge it would be impossible to tell there was an overage, and the quantity of overage; is that true?

A. Yes.

Q. You are testifying to that from these records, are you not?

A. The records appear to show it" (pp. 371-2; 375-6).

Secretary Norcross, thoroughly familiar with the accounts of the Western Fuel Company so understood the books of Mills:

"Q. Have you any personal knowledge, Mr. Norcross, as to when these overages are computed, either overages or underages—shortages?

A. Computed where?

Q. At what particular time; that is, as to whether they are computed at the time there is a cleanup at the barge?

A. I understand that is the way.

Q. What do you understand by the words 'cleanup of a barge'?

A. I mean whenever he has taken out the quantity that is in there; if he ever exceeds the amount he is debited with it is called a cleanup, as I understand it" (pp. 203-4).

And in stating the time when reports would be sent by Mills to Smith, he stated:

"The defendant Mills sent a daily report showing overages, whenever one occurred on one of the barges *as a cleanup*, to the defendant James B. Smith" (p. 1245).

David G. Powers, who for six months acted as Mr. Mills' immediate assistant, with reference to these books testified:

"When the barges were cleaned out Mr. Mills would figure up his books and his overs or unders, which would show on the books" (p. 701).

Edward Powers, assistant superintendent of docks for four years and who, during the infrequent absences of Mills, would make the necessary entries in his books, clearly showed that the entry of these overages indicated a cleanup of the barge, he saying:

“Q. Now, it frequently happened, did it not, or sometimes happened, that a barge would be cleaned up within two or three days?

A. Yes.

Q. In other words, that a quantity of coal would be put upon a barge, and that coal taken over to a boat and discharged into the boat, and a cleanup would occur?

A. Yes.

Q. That sometimes occurred?

A. Yes.

Q. And it is also true, is it not, Mr. Powers, that in those instances where a quantity of coal would be taken upon the barge, and the barge taken over and discharged into a boat, or boats of the Pacific Mail Steamship Company, or some other line, or that line and some other time, that a cleanup would occur, in other words, all of the coal on the barge would be taken off?

A. Sometimes.

Q. Sometimes; and it is a fact, is it not, that in almost every instance where that occurred, where coal was put into the barge and taken out within two or three days, or within a day or two and a cleanup would occur, that there would be an overage?

A. Yes.

Q. And it sometimes occurred that in some instances, at least, there would be a considerable overage; isn't that true?

A. In some cases, yes” (pp. 878-9).

And emphasizing the situation later on he said:

“Q. Did it sometimes occur—in fact, did it not frequently occur that one of the barges during the time that you were assistant superintendent, would take on coal one day, either from a vessel in which coal was being imported to this port, or from some of the pockets of the offshore bunker, and discharge that coal within two or three days thereafter?

A. Yes” (pp. 884-5).

To demonstrate the untruthfulness of the testimony given by the defendant Mills, that cleanups occurred only once every two or three years with respect to some of these barges, a number of witnesses were called in rebuttal. Among those was the witness whose testimony was last quoted, who, in rebuttal, said:

“During the time I was acting as assistant dock superintendent, the barges of the Western Fuel Company were actually cleaned of coal at least 75 per cent of the time. I personally attended to and directed the movement of those barges. It frequently happened that two barges would be coaling a Pacific Mail liner and that there would not be a sufficient quantity of coal on those barges to complete the coaling of that liner. Before any other barges would be brought to the liner, however, those two barges would be emptied to within a few scattered tubs. If we could take up a full tub, we would send it up; otherwise we would let the coal lie there” (pp. 2234-5).

E. H. Montell, an inspector who for years had been stationed on barges to prevent the transfer of opium from the liners to the barges testified:

“They would take out the coal as long as they could shovel it into the buckets without detaining the men too long. When the bulk of the coal got out, they would stop work and the barges would go away again. To the best of my judgment, I would say there would be left in the barges anywhere from five to twenty tons of coal which had not been scraped up or cleaned out. That was the situation so far as I saw it every time I had the barges in observation. In other words, this same quantity of coal still remained every time they cleaned out.

* * * * *

I cannot say that I have ever seen one barge waiting alongside for another barge to get cleaned up so that she could take her place in coaling one of these big liners, though I have seen a barge clean up and go away and another come in within an hour or two. As near as I could say, the barge thus going away would be empty” (pp. 2216-17).

And again, referring to the twenty-five or thirty tons that would be left in a barge that had been cleaned up, the witness said:

“I should say there might have been 25 or 30 tons of coal left in the barge. It was scattered along through the barge with a little amount in each end. That is where the coal would ordinarily be left in the cleanup of a barge” (p. 2218).

George B. Richardson, another customs inspector who, for five or six years had been detailed to watch the Pacific Mail steamers for opium, had occasion not only to watch the barges, but at times, after they had stopped coaling, to search them

to see that no opium had been transferred to them. As to the condition of these barges he said:

“On several occasions I would remain on the barge until she was practically cleaned out.
* * * Sometimes I would descend into the hold of those barges to make a search for opium. I generally noticed on such occasions that when the barge was about to be replaced by another barge it was practically cleaned out. There might be anywheres from two to twenty-five tons of coal scattered around, principally in the wings in little piles and in the ends of the barge. The amount of coal thus left would vary all the way from three tons to twenty-five tons. If the ship was not fully coaled, a barge, before leaving, would be practically cleaned out down to the amount I have mentioned. Sometimes I would observe barges out of which some coal had already been discharged being brought to the side of a liner, and I have observed such barges to remain at the side of the liner until they were practically cleaned out of coal” (pp. 2221-2).

Symmes H. Hunt, another inspector performing the same duties as were assigned to the last two witnesses, gave similar testimony, he testifying:

“I sometimes observed one barge, out of which coal had been taken for the purpose of coaling a liner, move away and be replaced by another barge. Sometimes the first barge would be nearly cleaned out, and at other times, she would have perhaps from 100 to 150 tons of coal left aboard. *I have seen the barges cleaned out many times. Before another barge would be brought alongside, the first barge would be cleaned out*” (p. 2224).

One of the engineers and some of the shovellers engaged for years in shovelling coal from the

barges into the buckets, by means of which it would be delivered to the vessels coaled, gave similar testimony. The testimony of Robert Sass is important upon this point. He said:

“I was, as I have testified heretofore, hoist engineer on the barges. Sometimes I have seen a barge removed from a liner without being cleaned out of coal, *but more often the barges would be cleaned out*. When the barges were not cleaned out a few tons of coal would be left located in both ends of the barge and a little around the wings. The more frequent occurrence was that the barge would be cleaned out before she would be moved from the side of the liner. That coal was practically always there and never removed” (pp. 2226-7).

And, Jim Balestra, testifying to the same point said:

“When I was working as a shoveler in the barges operated by the Western Fuel Company, we would clean out the barges four times out of five. I mean to say that we would clean them out except for a little coal around the edges and at both ends, amounting to perhaps a ton or two” (p. 2229).

By cleaning out a barge, of course, is not meant the removal of every particle of coal. The construction of these boats is such that it would be impossible to accomplish such a result excepting at the expense of extraordinary labor. But the quantity of coal remaining in a barge at the time of a cleanup would always be present. As Sass testified:

“That coal was practically always there and never removed” (p. 2227).

It was just as much a part of the barge itself as though it had been permanently located there for ballast. Its presence in no way affected the weights of coal laden upon, or taken from the barges, or the overages, with the exception of the first cleanup after the barge originally went into service. When that occurred, she had and thereafter continued to have that same quantity in the hold.

LOGICAL EFFECT OF PROOF OF CLEANUPS.

By the testimony quoted, as well as by the books themselves, we have demonstrated so far as human agency will permit, that with each overage the barge was discharged of her entire cargo. The effect of such proof is to likewise establish that by the fraudulent weights and manner of weighing indulged in on the barges, cargoes apparently increased in weight within a comparatively short time, sometimes only within a few days, as much as 30 or 40 per cent. These overages confessedly could not be explained away by expert testimony.

While we might be able to find authority for increases such as are here involved, by resort to biblical history, inasmuch as it is not claimed that any of the defendants possess miraculous powers, that character of defense is foreclosed. In the absence of independent proof of fraud, these instances of overage themselves would be sufficient to establish it. Explained, however, by positive and convincing

evidence, that the overages complained of were directly caused by the fraudulently overweighing of the coal, it is inconceivable to us how counsel for defendants can claim that the evidence fails to justify a finding of fraud.

FRAUDULENT DRAW-BACK CLAIMS.

Among the vessels being supplied with coal by the Western Fuel Company were a number registered under the laws of the United States, engaged in foreign trade. Under the laws and regulations of the United States, for each ton of imported coal upon which duties had been paid, laden upon these vessels for fuel purposes, the individual or company owning such vessel was entitled to have refunded to him, or it, from the United States, the duty actually paid upon such coal. Most of these vessels enjoying the benefit of draw-back belonged to the Pacific Mail Steamship Company. The names of these vessels, that they were engaged in foreign trade, and that they carried the American flag, were proven (pp. 102-3). When foreign coal is intended to be placed in a vessel for the benefit of draw-back, a draw-back entry is made by or on behalf of the owner of the vessel. A sample of this draw-back entry appears on page 2907, volume VIII of the record. In this entry, the name of the steamship, the quantity of coal which it is estimated is to be placed in the bunkers, the date upon which, and the name of the vessel in which the coal was im-

ported, and the amount of duty paid, are all set forth. A declaration is then made by the owner, or his attorney in fact "*that the duties thereon were paid at the port of San Francisco*" on a given date.

Upon the making of this entry, the collector or his deputy requires the Surveyor of Port to direct an inspector to superintend the lading of the coal, and upon completion, to give him notice thereof. The coal is thereupon discharged into the bunkers of the vessel, the weights thereof being taken in the manner hereafter described, by an assistant customs weigher, after which, an endorsement is made upon the entry indicating the weight of the coal both in tons and pounds discharged upon the vessel, and the date upon which she cleared.

In the sample case referred to, the estimated weight of the coal was 3000 tons. The ascertained weight at point of delivery, 2965 tons 1385 lbs, the drawback or refunded duties being \$1986.88.

Accompanying the demand for the refund of the duties, an affidavit is required, containing the statement that the coal was imported, as stated in the entry, *the duties were paid thereon*, as therein shown, that the merchandise had been delivered to the company making the claim, and that no other certificate of delivery covering the merchandise had been issued (p. 381).

Upon compliance with these conditions, and only then, would the duty upon the coal be refunded.

If, in these drawback claims, it appeared that the weight of the coal delivered to a vessel with

benefit of draw-back exceeded the out-turn weight of such coal at the place of importation, upon which weight, duty had been paid, it is, of course, obvious that the Government would be refunding more duty than had been paid on said coal or that it had received.

If, as we have already shown, the actual weight of coal laden into these barges was the weight with which the barge was charged, and was also the weight upon which duty had been paid, and that when this coal was laden into vessels with benefits of draw-back, the weights were incorrectly taken and the coal was represented to the Government by the claimant of the draw-back, to weigh much more than its actual weight, and duties based upon such incorrect weight were paid to the claimant, it is equally obvious that the Government was being defrauded out of the duties refunded by it, representing such excess weight. It is equally true that the owner of the vessel who paid for his coal according to weights taken on the barge at time of delivery was likewise being defrauded out of the moneys paid by him, representing such excess weight.

And if an affidavit is made in which it is asserted that the quantity of coal represented by such excess weight *was actually imported upon a particular steamer and that duty had been paid thereon*, such affidavit is false and the person verifying it with knowledge of its falsity is guilty of perjury.

Table C, United States Exhibit 125, based on the draw-back entries and the books kept by defendant Mills shows that draw-back duties were refunded by the Government on 22,456 tons and 229 lbs. of coal in excess of the actual weight of the coal upon which duties had in fact been paid.

In some of these cases, as the evidence will show, the affidavits accompanying the claims asserted that the coal had been imported upon a particular vessel in which, in some instances, no part, and in other instances only a part of the coal had been imported. Most of these affidavits were made by the defendant, James B. Smith. Others had been made by the defendant, Howard, or other representatives of the Western Fuel Company.

So that the jury could understand the situation, several of these entries were explained by Mr. Tidwell. In this connection we desire to direct the court's attention, merely for the purposes of illustration, to three of these transactions.

A draw-back entry was made for 275 tons of coal which it was claimed had been laden on the steamship "Peru", which coal, it was asserted, had arrived at this port on the steamer "Harpeake", December 17, 1910, custom house entry 16806. On January 30, 1911, the barge "Ruth" had had a clean-up, in other words, all coal laden upon her had been completely discharged. Up to that time, and subsequent to her last clean-up, there had been checked into her 816 tons 1440 lbs. It had been laden with

coal upon four occasions: upon one occasion she had taken from the off-shore bunkers	558 tons	1970 lbs.
from the same bunkers	6 “	60 “
from the same bunkers	56 “	240 “
and from the steamer “Thor”	195 “	1410 “
aggregating	816 “	1440 “

With only this coal laden upon her, according to the records showing weights taken when discharging this coal into the vessels, it was claimed that she delivered to the steamer “Peru” 275 tons 1062 lbs. to the steamer “San Jose” 317 “ 222 “ and to the “City of Para” 290 “ 1432 “

making a total of	883 “	476 “
or	66 “	1276 “

more than she had taken on board (pp. 372-376).

The 816 tons 1440 lbs. represented the out-turn weight upon which the Government had been paid duty (p. 377).

All of these boats were American bottoms, engaged in foreign trade, with benefits of draw-back. Based upon this fraudulent and excessive weight, the Pacific Mail Steamship Company presented draw-back claims, supported by proper vouchers, and was paid by the Government, duties upon 66 tons 1276 lbs. more coal than it had received (pp. 378-384).

On this transaction the Government was paid duty on 816 tons 1440 lbs., which, at 45 cents per ton, equalled \$367.50, and returned to the Pacific

Mail Steamship Company, duties on 883 tons 476 lbs., amounting to \$397.45. In other words, it refunded \$29.96 more than it had received.

Another illustration may be gathered from the barge "Theobald". On October 4, 1906, this barge received from the steamer "Torjeviking" 1052 tons 1740 lbs. of coal, according to the ascertained weight, and upon which the Government was paid duty. Although this was all of the coal laden upon her, she was taken to the steamer "Sonoma" and, according to the records kept by the defendant Mills, delivered to the "Sonoma" 1134 tons 1297 lbs., or 81 tons 1797 lbs. more than she had taken on. For this last quantity of coal, a draw-back claim was made, supported by the necessary affidavit and declaration, upon which the Government refunded to the Pacific Mail Steamship Company, an amount representing duties paid upon coal claimed to have been delivered to the "Sonoma" (p. 419). In this case, the draw-back claim related to all of the coal laden upon the barge.

Again on January 21, 1906, the barge "Theobald" having previously cleared, received from the steamship "Tellus" 1114 tons 480 lbs. and from the barge "Viking" 410 tons 1100 lbs., making a total of 1524 tons 1580 lbs. She thereupon discharged into the "Sierra" 951 tons 91 lbs. and into the "Mongolia" 717 tons 1515 lbs., making a total of 1668 tons 1606 lbs. which was *144 tons 26 lbs.* more than was laden on the barge. A draw-back claim was presented based upon all of the coal

claimed to have been discharged, supported by affidavits, apparently always available, and paid by the Government (pp. 411-412). For other illustrations see pages 412-418.

**CLAIM AND AFFIDAVIT FALSE, RESPECTING IMPORTING
VESSELS.**

For the protection of the Government, the affidavit accompanying the draw-back claim must state the name of the vessel in which the coal upon which the refund duty is claimed, was imported. A similar statement must be made in the draw-back entry itself. A comparison between many of the draw-back claims and affidavits introduced in evidence, and the records kept by the defendant, Mills, pointing out the disposition of the cargoes of imported coal discharged, will show that the affidavits made from time to time by the defendant, Smith, in addition to the false statements already referred to, also contained false assertions regarding the name of the ship upon which it was claimed the coal described in the draw-back entry and affidavit was imported. For brevity's sake and to illustrate this portion of our argument, we will direct the court's attention to one typical case.

On January 18, 1907, the steamer "Tellus" arrived at San Francisco from Ladysmith, having upon her, according to her bill of lading and invoice, 3752 tons of coal. She subsequently discharged 3645 tons, the shortage being 107 tons (p. 1285). The "Tellus" first commenced to discharge on January

18, 1907, and finished January 21, 1907 (p. 1290). No portion of the cargo of this steamship was discharged into the offshore bunkers (pp. 2191-2).

According to the records kept by the defendant, Mills, between the 7th and 31st days of January, 1907, there was laden upon the barge "Nanaimo" the following quantities of coal from the following sources, viz.:

On January 7, from the steamship			
" Sheila "	266 tons	1480 lbs.	
On January 10, from the offshore			
bunkers,	31 "	1830 "	
On January 9 and 11, from the			
steamship " Sheila ",	719 "	650 "	
From the ship " Titania ",	809 "	1390 "	
	<hr/>	<hr/>	
making a total of	1827 "	870 "	
(pp. 1288-9; 1293).			

The court will notice that the only coal taken from the offshore bunkers by the "Nanaimo" was on *January 10, 1897*, and that the steamship "Tellus", as has already been shown, did not reach port until *January 18, 1907*, ten days later (p. 1280).

The remaining coal laden upon the "Nanaimo" was received directly from the "Sheila" and "Titania".

The coal thus laden upon this barge "Nanaimo" was delivered to the "City of Sydney", "Coptic", "Track", "City of Para" and "Korea". Her total discharge, according to the record of weights kept,

was 1954 tons 1521 lbs., or an overage of 127 tons 642 lbs. (p. 1289).

The court will further note, however, that into the "City of Para" was discharged 31 tons 400 lbs. of this cargo.

Between January 21 and January 23, 1907, there was checked into the barge "Theobold" 451 tons 630 lbs., consisting of two items, first:

Offshore bunkers,	39 tons	2170 lbs.
"Tellus"	411 "	700 "
	<hr/>	<hr/>
making a total of	451 "	630 "
(p. 1289.)		

The coal which came from the offshore bunkers was checked into the barge January 21, 1907 (p. 1290). The court will also remember that none of the cargo of the "Tellus" went into the offshore bunkers on or prior to this date. The whole of the cargo of the "Theobold" was delivered to the "City of Para". When discharged, however, according to the weights kept, it had increased in weight in not more than three days, 82 tons 1007 lbs. (pp. 1290-1). From this record it appears that the only portion of the coal delivered to the "City of Para" that came off the steamship "Tellus" was 411 tons 700 lbs. A drawback entry was presented by the Pacific Mail Steamship Company covering all of the coal claimed to have been delivered to the "City of Para", including the overage. The rebate claim was numbered 63 (pp. 1285-6). In

the entry the vessel upon which *all* of this coal was imported is stated to be the "steamer Tellus", and that such coal was imported in her on January 18, 1907. Accompanying this drawback claim was an affidavit sworn to by James B. Smith, in which, among other things, he states:

"I, Jas. B. Smith, Vice-pres. and a stockholder Western Fuel Company do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon as herein shown * * *"
(p. 1285).

A table showing this transaction appears at page 1293.

In this case the affidavit was false respecting the vessel in which the coal was imported, the time when such importation occurred, the quantity of coal actually delivered to the "City of Para", and was also false in respect to the statement that upon all of said coal duties had been paid to the Government.

The illustrations cited are but a very few of the several hundred of instances where false drawback claims were presented and paid, each based upon a false affidavit.

KNOWLEDGE OF FRAUDULENT OVERAGES.

From the evidence already discussed and pointed out, it affirmatively appears that the existence of these overages was known to the defendants.

At the conclusion of each day's work a report of the day's business would be prepared by Mills and forwarded to the office of the Western Fuel Company, for the benefit of the defendant James B. Smith and its other officers. These reports disclosed all coal discharged from importing steamers and, upon clearance of their cargoes, the resulting shortage or overage would be made manifest. It would also contain a statement of the coal taken upon the barges and the amount supplied to vessels buying coal. When the barges "cleaned up" the overage or shortage would also be made to appear (pp. 202-203). So far as overages on barges were concerned, as was said by Secretary Norcross:

"The defendant Mills sent a daily report showing overages, whenever one occurred on one of the barges at a cleanup, to the defendant James B. Smith" (p. 1245).

In fact, whenever such cleanup would occur, a specific report covering its receipts and discharges would be made (pp. 201-202), and the letter "E" would in each instance be written in the books of Mills, indicating that the items had been entered and the reports sent.

The defendant Smith himself testified that Mills' reports "always showed the overages" (p. 2192), and the defendant Mills, on cross-examination, admitted that the daily report sent by him to Smith was "similar to my book" (p. 2141).

These overages from barges, as well as the overages developed from time to time in the other

departments of the Western Fuel Company, were shown upon the monthly statements of coal received in evidence. For instance, in the statement of coal received for the month of June, 1906 (United States Exhibit No. 29) appeared the following:

“Q. R. Ex barges 559 tons, 367 lbs.”

This item is explained by Norcross to mean the “total over-run of deliveries out of barges for that month” (pp. 141-142). And, as explaining how this overage was understood, he further testified:

“Q. What do you mean by overrun?”

A. I mean excess reported over weights reported having been in the barges.

Q. Then that item explained means this, that 559 tons of coal were taken off the barges more than placed into the barges during the month of June, 1906?

A. I do not know that it does.

Q. Well, what does it mean?

A. It means that Mr. Mills reported having taken off that much more than he reported having taken in.

* * * * *

Q. Then the explanation of that item is, that Mr. Mills, he being one of the defendants in this case, reported to the company that he took off the barges 559 tons and 367 lbs. more coal than was put on to the barges?

A. That is right.

Q. I just want to call your attention to two or three of these items, Mr. Norcross, because I suppose your explanation will be the same as to all of them.

A. It probably will” (p. 142).

And in explaining a similar entry showing an overrun of coal in yard, he testified:

“Q. Then it is one of two things: it either represents that after you sold all of the tons of coal that your books showed should have been or were placed in the yard, you still had 808 tons on hand, or that you sold 808 more tons from the yard than your books showed you had placed in the yard; is not that correct?

A. That is correct” (p. 145).

The existence of those overages between 1904 and 1913 were not only known, but were repeatedly discussed by Secretary Norcross with the defendant James B. Smith and with the president, John L. Howard (pp. 204-205).

The financial statements presented annually to the directors and stockholders likewise at times disclosed the result of the overages in money (United States Exhibits 96-103).

COMPLAINTS BY ENGINEERS OF THE PACIFIC MAIL STEAMSHIP COMPANY SHOWING SHORTAGE IN COAL.

That the overage shown to exist by the books kept by the defendant Mills and by the records of the Western Fuel Company was due to false and fraudulent weights and not to any actual increase in the weight of coal, is attested by the many complaints made from time to time by engineers of the Pacific Mail Steamship Company, in the course of which they repeatedly insisted that their boats were not being supplied with the quantity of coal charged against them and for which the Pacific Mail Steamship Company paid.

During the whole of the period of time between April, 1906, and January, 1913, William Chisholm was marine superintendent of this company (p. 436), and as such, had general supervision and control of the coaling of its vessels (p. 438). It was his duty, among other things, to see that the coal called for by the weights furnished to the Pacific Mail Steamship Company were correct (pp. 440-441). The person who immediately supervised the weighing and checking of the coal delivered to these vessels was William Marks (p. 439).

Although almost incomprehensible, it appears that while Chisholm had been repeatedly notified that the Western Fuel Company was over-weighing the coal which was being supplied to the vessels of his principal, he never attempted or pretended to make any investigation until two years thereafter, and then only upon two occasions and for short periods of time. We quote from his testimony:

“Indirectly, I have been notified, as marine superintendent, that the coal was being over-weighed. Such indirect notifications came to me while I was receiving donations of coal and money. I think I had such indirect information in 1912. In 1909 I received notice about the first shortage of coal on one of our ships. I never made any investigation for the purpose of ascertaining the weight of the coal that was checked in or upon the barges, or whether coal had been weighed before it was placed on the barges. * * * I do remember receiving such a notice from a man named Hamilton, who was chief engineer on one of our boats. I should judge that was in 1911 or 1912.

I also received notice from a man named Bunker, who was chief engineer on one of our boats. * * * After receiving these notices I did not endeavor to ascertain whether the coal discharged from the barges was weighed before being so discharged (pp. 441-442).

* * * * *

To the best of my knowledge I received only two complaints about short weighing since 1907. The complaints were not general in their character. They referred to particular steamers on particular trips. The steamers were the 'Manchuria' and the 'Siberia' " (p. 445).

In January, 1909, W. L. Bunker, chief engineer of the steamship "Manchuria", forwarded a communication to Chisholm, in which he stated:

"Please be advised that in coaling at S. F. we received all coal taken on board in reserve bunker and drew from main bunkers for port use. Have weighed samples of the coal supplied in S. F. and find it runs 41 cubic feet per ton (when allowed to partly dry out); by allowing this average, we are still 123 tons short. *This shortage I have charged to port consumption at S. F., making 309 tons in place of 186 tons as actually burned*" (p. 455).

Respecting the circumstances under which this letter was written, Bunker himself testified:

"I do not remember getting any instructions to put in a report in writing. Naturally, I believed there was a shortage on that occasion or I would not have written the letter. I was employed, body and soul, by the Pacific Mail Steamship Company at that time, and the report was made in my capacity as chief engineer on the liner 'Manchuria' " (p. 1075).

It seems that before the voyage started upon which this letter was written, personal complaints had been made by Bunker, among others, to Chisholm (p. 1079). One would imagine that, whether the sending of this communication was the result, as claimed by Bunker, of positive and definite information acquired by him respecting the quantity of coal placed in his reserve bunker, or whether it was the result of mere suspicion that the company was being shortweighted in coal, his attitude and conduct would call, if not for praise, for at least encouragement. Encomiums, however, were not for any such employees of the Pacific Mail Steamship Company, for, according to Bunker's testimony, not disputed by Chisholm, the only response that he received to his letter was:

"He (Chisholm) told me not to write any more letters of that description" (p. 1081).

A year later, on January 31, 1910, J. S. Hamilton, chief engineer on the steamship "Siberia", sent a communication to Chisholm, in which he said:

"Our average daily consumption was 160 tons, but I have to log 7 tons per day more to bring the bunkers square, as from the amount we were charged with fully 100 tons of rain water went in with the coal" (p. 444).

Neither of these two communications, it seems, stirred Chisholm into activity; for we find that no investigation was made by him until a long time after the receipt of the last letter. As to this, Chisholm himself says:

"It is true that the first complaint I received was around 1908 or 1909. The reason I waited two years before going down to the dock at night to find out whether the coal had been properly handled was that I was satisfied when I received the first complaint that there was absolutely nothing in it" (p. 446).

Even after waiting for two years the investigation pursued by Chisholm was not very enthusiastic or comprehensive; for, according to his testimony, his activities consisted in going down to see how coal was handled upon one or two occasions, he stating:

"Once or twice when coal was being laden into our liners at night I was present for the purpose of seeing how the coal was handled and whether our men were at their stations. These visits of mine occurred, I think, in 1911, and they were with reference to the complaints or communications hereinbefore referred to. I went there quietly, not making my presence known, because I wanted to see if there was anything wrong in the operation of coaling. On each occasion, I remained an hour or half an hour. I discovered nothing wrong on either occasion" (p. 445).

He then states that upon perhaps half a dozen occasions in 1911 or 1912 he had the scales on the barges tested (p. 445).

Before becoming marine engineer Chisholm had been chief engineer of the "Mongolia" for a number of years. He knew exactly how liners were coaled. He also must have been familiar with the method of weighing, and therefore knew that weights were determined by averages. Even

though the scales were accurate, he likewise knew that the accuracy of the weights depended upon keeping the tubs even and in insisting that the tubs that were weighed should be as nearly as possible representative of the tubs that were not weighed. Knowing all of these things, however, with an innocence indicative of childish simplicity his sole resort was to the scales. And, as weights were seldom taken more than two or three times during the night, a half hour's inspection could accomplish little, if anything.

Another peculiar transaction occurred which is rather a persuasive circumstance, in connection with others to which we shall hereinafter direct the court's attention, indicating some sort of collusion between the employees of the Pacific Mail Steamship Company and the officials of the Western Fuel Company.

It frequently occurred that vessels would be coaled from both sides at the same time. In thus coaling a ship, two barges would be used, and, of course, it would be impossible, as Chisholm himself testified, for Parks to keep watch upon the coaling operations thus simultaneously in progress (p. 442).

Parks, when cross-examined, conceded that as to one of the barges no representative of the Western Fuel Company would be present (p. 1534).

In 1908, because of complaints made to Chisholm concerning the shortweighing of coal, he recognized the necessity of employing some person

to assist Parks in keeping a record of the weights of coal being supplied to the ships, and to see that the tubs were kept even. Instead of acting as ordinary prudence would suggest, *he went to the defendant Mills* and requested him to send him a man to be thus employed. Mills furnished David G. Powers, telling him, as might be expected, "to give the Western Fuel Company the best of it". The circumstances surrounding his employment and what, if anything, was accomplished, is illustrated by his testimony. Says Powers:

"In 1908 I was sent to the Pacific Mail Steamship Company's dock by Mr. Mills to work for the Pacific Mail Steamship Company as a weigher. * * * I remained in their employment about sixty days. I quit them in disgust. I supposed Mr. Chisholm was my superior, but I got my orders from Mr. Mills. Mr. Mills, in sending me over, told me to give the Western Fuel Company the best of it. In sending me over to the Pacific Mail Steamship Company, Mr. Mills told me that said company had informed him that they were receiving complaints from their engineers about the short-weighting of coal, and had requested that he send them a weigher to assist their own weigher, Mr. Parks. I reported to Mr. Chisholm who testified here the other day. My duties during the sixty days of my employment with the Pacific Mail Steamship Company were checking coal with the customs weighers on board the barges which were being discharged into the Pacific Mail steamers. I was paid by the Pacific Mail. As to what I observed, it was the same old racket all along; they were robbing the Pacific Mail. I saw the same thing the second day I was working for them. I went to Mr. Chisholm and complained

and told him he was being robbed. In answer he tapped me on the back and said, 'You are getting your pay, aren't you?' and I said 'Yes'. Then he said, 'Well, go back and sit down and say nothing; keep your mouth shut' " (pp. 697-698).

Further complaints were made by him to Mr. Donaldson, who at that time was assistant superintendent of the Pacific Mail Steamship Company (p. 699).

That Powers was employed by the Pacific Mail Steamship Company in the capacity of weigher is not denied. That he was directly employed by the defendant Mills, acting for Chisholm, is likewise undisputed.

The complaints to marine superintendent Chisholm were only a few of the many protests made by the engineers. Evidently realizing that nothing could be achieved through this source, they went directly to the representatives of the Western Fuel Company. Bunker himself testified:

"Most of my complaints were made to Powers, who was the weigher for the company. On a few occasions I complained to Chisholm, the marine superintendent. I complained more than once to Eddie Powers. He was the outside man for them and, of course, I used to tell him I thought the weights were not right. I do not remember making a personal complaint to the defendant Mills. I told him several times that I thought his coal was 'bum', and that it was short on weight. Mills on such occasions told me that the Government weighed the coal, and what could he do about it" (p. 1076).

It seems that Mills thought that he could purchase the friendship and silence of Bunker, like the friendship and silence of other employees had been bought, as we will hereafter show. One day Bunker met him on the dock and Mills said, "If you would like a ton of coal", or something like that, "I will send it over to the house", but Bunker, unlike some of its other employees and officers, told him that he had better put the coal in the ship (p. 1076). Notwithstanding this statement, however, Mills sent to Bunker's house a ton of coal, accompanied by a receipted bill (pp. 1076-1077).

While Edward Powers was assistant superintendent of the docks for the Western Fuel Company, he also received many complaints. Upon this subject he testified:

"While I was assistant superintendent there were quite a few complaints from engineers of the Pacific Mail Steamship Company regarding the shortages of coal. I communicated these complaints to the defendant Mills. * * * The complaints that came to me from engineers were not always about shortages. Sometimes they had reference to the quality of the coal. I received complaints concerning shortages of coal quite often,—whenever they could catch me, that is, I guess, when I did not see them coming. I cannot remember how often I received complaints while I was assistant superintendent, but it was quite often. I would say in answer to these complaints that we were selling the coal by weight, and that the United States custom men were weighing it. When I spoke to the defendant Mills about the matter, he would tell me that the United States custom men were weighing the coal. He gave me the

same excuse that I was giving the other men, and it was a true excuse (pp. 869-870).

* * * * *

“I don’t recall any period of time during which I was acting as assistant to the superintendent when complaints were not made by engineers of the Pacific Mail Steamship Company and other boats regarding shortages of coal. The complaints were made from time to time during the entire interval. I would give the excuse and then walk away from them. They may have said lots of things but I did not hear what they said. I think Mr. Chisholm once told me about the matter, and said that Mr. Bunker had complained. I believe he also called my attention to a complaint made by Mr. Hamilton, the chief of the ‘Siberia’. I believe also that I had complaints direct from Bunker and Hamilton, as well as from other engineers. I also received personal complaints from Thomas Sawden, chief on the ‘Peru’, and then on the ‘Mongolia’. There was another complainant, whose name I do not recall; he is now dead. Thomas Sullivan, who succeeded Mr. Sawden on the ‘Mongolia’, also complained” (pp. 872-873).

Nor can there be very much question but that the complaints of these engineers were well founded.

“Q. Well, when these complaints were being made to you from time to time by engineers in the employ of the Pacific Mail Steamship Company, for instance, confining your attention at this time to those complaints, did you know whether there was any justification for the complaints?

A. Well, I thought there might be.

Q. You thought there might be. Why did you think there might be?

A. The barge showed a little overage; I thought there might be something to do with it, moisture and so forth.

Q. Of course, that is not a complete answer to my question. You say that you did think there might be some cause for the complaints made from time to time by the different engineers, with reference to the quantity of coal or the shortage of coal, or the quantity of coal that was discharged into the ships upon which they were acting as engineers. Now, I will ask you why, in your judgment, or rather, why did you believe or did you think or conclude that there was justification for those complaints?

A. The fact that the barges overrun; they show in the book they overrun.

Q. And that indicated to your mind what?

A. Well, they were getting less coal than was charged to them" (p. 886).

According to the same witness, the bunker complaint was reported to J. B. Smith, who, in his characteristic manner of disposing of such matters, observed that "he is always kicking" (p. 887).

Of course some reason must have existed for Chisholm's constant state of innocuous desuetude, so far as investigating complaints was concerned, and for his extreme friendliness towards those who, if the complaints were well grounded, were intentionally and by criminal conduct defrauding his employer. That it was impossible for the Government to delve deeply into the vitals of this peculiar relationship, so as to thoroughly develop it, can readily be imagined. Sufficient appears in the record, however, to account not only for Chisholm's apathy, but to cause one to suspect that the Western Fuel Company, acting through the defendants James B. Smith and Frederick C. Mills, believed it necessary to create a friendly disposition on the part of the employees of the Pacific Mail Steamship Company,

even though its result might be a lack of loyalty on their part to their employer.

COAL FURNISHED GRATIS TO EMPLOYEES OF THE PACIFIC MAIL STEAMSHIP COMPANY, AND GIFTS OF CASH MADE.

If the ordinary course of business were pursued, if the usual business acumen were displayed, one would imagine that the dealings between the Pacific Mail Steamship Company on the one side, and the Western Fuel Company on the other, would be carried on at arm's length, and accounts presented by the latter to the former closely scrutinized. To accomplish this, no divided allegiance could be permitted. Absolute loyalty on the part of the employees of the steamship company would be demanded. Yet, throughout the entire period covered by the evidence introduced on the part of the Government, we find that quantities of coal were gratuitously delivered to the houses of many of the officials and employees of the Pacific Mail Steamship Company. This practice of petty bribery apparently excluded no one. It included R. P. Schwerin, president of the Pacific Mail Steamship Company; Chisholm, its marine superintendent; employees of the treasurer's office, Parks, its weigher; its subordinate employees employed upon the docks and barges, and almost reached to the office boy. Chisholm admits the existence of this situation, he testifying:

"I have since I have been marine superintendent, received donations from the Western Fuel Company. To the best of my memory the first donation was about the first Christmas

that I was marine superintendent. That was in 1908. I received a Christmas present. It was about \$50, and I was receiving that sum each year thereafter. It was in cash. I have also during the entire time that I have been active as marine superintendent been receiving donations of coal from that company. The first donation of this kind, I think, was in 1908. I have been receiving my coal from the Western Fuel Company ever since. It has been delivered at my home in, I think, ton or two ton lots. I would receive two or three such lots each year, I suppose, but I did not keep accurate track or record of it. At any rate, whatever coal I use at my home has been received from the Western Fuel Company, and has been received by me practically ever since I have been marine superintendent" (pp. 438-439).

Extracts from the donation account of the Western Fuel Company, in so far as they were material in this case, were introduced in evidence and will be found on pages 652 to 654 of the record. Most of these items relate to employees of the Pacific Mail Steamship Company. Among them will be found donations to P. H. McCarthy, clerk in the treasurer's office; chief engineers, Chisholm, and others. Among these names will be found the names of several of the United States assistant weighers, to which reference will hereafter be made.

This donation account does not show cash presents made during the holidays by the Western Fuel Company to employees of the Pacific Mail Steamship Company. Nor does it show moneys paid to assistant weighers for overtime, in contravention to the rules of the department. That it does not

show all of the coal gratuitously donated to officers and employees of the Western Fuel Company is made manifest from what follows.

**COAL DONATED TO THE GENERAL MANAGER AND ALSO TO
THE PURCHASING AGENT OF THE PACIFIC MAIL STEAM-
SHIP COMPANY.**

For a number of years R. P. Schwerin was vice president and general manager of the Pacific Mail Steamship Company. In a different part of the ledger, entirely separate and apart from the donation account, was carried an account with Schwerin. This account was opened in September, 1911, the last item being June 18, 1913. During this period of time coal was supplied him aggregating \$1358. From time to time, according to the account, cash was paid representing credits. A copy of the account is found on pages 1239-1241. This account, if the entries were accurate, upon its face disclosed that Schwerin had paid at different times for every dollar's worth of coal that had been delivered to him. And yet every item indicating moneys paid by Schwerin was absolutely false. It was not until the Government was about to close its case that the falsity of this account was divulged. With respect to these items, secretary Norcross, being recalled to the stand, testified:

“The account shows that a certain amount of coal was delivered to R. P. Schwerin and paid for by him. The total amount from September 11, 1907, to March 12, 1910, is \$496, with credits of an equal amount to March 17, 1909. The coal was, according to the ledger, delivered to Mr. Schwerin's home at San Mateo and the account

is a personal one. I don't think any money was received from Mr. Schwerin for that coal. *I don't believe he paid a five-cent piece to the Western Fuel Company for any part of that coal.* The regular order would come to the office and go as a rule to the defendant James B. Smith, first. He would give notice to the shipping clerk to have the coal shipped and send a regular order to the wharf. All bills for coal deliveries are placed on Mr. Smith's desk, and, when these Schwerin bills reached him, he would hold them up, and at a later date sometime, go to the bookkeeper and tell him to receipt the bill and make an offset entry for it, charging the amount to operating expenses, so that, as a matter of fact, although our ledger shows Mr. Schwerin did pay for each quantity of coal delivered to him, it would appear that in fact there was not a cent ever paid by him to the company for that coal. * * * We would, however, after each one of these bills was receipted by the defendant, James B. Smith, and order charged to operating expenses, know in fact that this was to be a donation. I don't know why we did not put these amounts in the donation account" (pp. 1235-1236).

Referring to the second portion of the account, the witness further testified:

"This shows an amount of \$862 of coal furnished to Mr. Schwerin. Of that amount \$772 are shown by the ledger to have been paid. I don't think that Mr. Schwerin in fact paid a five-cent piece on account of that coal. I think the same procedure was pursued so far as each one of these deliveries of coal is concerned as was pursued regarding the other coal in the other account. The reason the account does not balance is that there are three items that apparently remain uncredited and unpaid" (p. 1237).

This same witness also admitted that coal had been supplied gratuitous to Mr. Thompson, the purchasing agent of the Pacific Mail Steamship Company, during the past five years (pp. 1241-1242).

This item likewise was not shown by the donation account, and, according to Norcross:

“There would be no way of telling what quantity of coal was supplied each year by the Western Fuel Company to Thompson” (p. 1242).

Nor could he give any reason why the donation account did not show these deliveries of coal, excepting that, “Mr. Mills did not report it when delivery was made” (p. 1242). What other deliveries were not reported, the Government was unable to learn.

It is significant, however,—a circumstance that should not be lost sight of—that no engineer was called to the stand by defendants to vouch for the accuracy of the claim that the Pacific Mail Steamship Company received all of the coal for which it purchased.

After a barge would be laden with coal, it would be removed from the offshore bunkers, and when coal was to be delivered to the bunkers of a vessel, it would be taken over to, and moored alongside of

or tied to the vessel to which coal was to be supplied.

Upon each of the barges was located a hoist by means of which the coal would be carried in tubs from the hold of the barge to the required height, and dumped into a temporary chute leading to the bunker holes of the vessel. The tubs on two of the barges were dumped by means of a rope controlled by a man known as the "dumper" occupying a position elevated above the deck of the barge. The tubs on the remaining barges were automatically dumped by a tripper with which they came in contact when they reached the desired height.

SCALES AND METHOD OF WEIGHING.

Two styles of scales were used upon the barges. On two of the barges, the Nanaimo and the Comanche, a type of scale known as a "hanging scale" or "rod scale" was used. This scale consisted of a perpendicular rod running down into the hold of the ship, on the end of which was a hook. The top of the rod was attached to the hanging scale. When a tub was to be weighed, it would be hooked on to the scale and its weight taken by the Government weigher. In this operation, the tub while being weighed, would be located in the hold of the barge under the hatch (pp. 690, 858, 1178).

This hanging scale could not be used until a considerable quantity of coal had been removed from the barge, thus making an opening in the coal of sufficient depth to permit the use of the hanging

scale (pp. 690-1). Before reaching the bottom of the barge or technically speaking the "skin of the barge" by the removal of the upper part of the coal four or five hours would be consumed" (p. 1178).

On all of the other barges, a type of scale known as a platform scale was used. This scale, lodged upon wheels, would be spotted upon the deck of the barge adjoining the hatch from which the coal was being raised. As the tubs of coal would be hoisted out of the hatch, it would be necessary for at least one of the shovelers in the hold to climb up to the deck and by means of two rope tails attached to the bottom assist in pulling the tub over to, and landing it on the scale (pp. 691-3). Upon occasions it was essential to bring two men up from the hold for this purpose (pp. 860-1, 1099).

While coal was being discharged into the bunkers of a ship, shovelers known as "trimmers" would be located in the bunkers for the purpose of distributing and levelling the coal being received into these bunkers through the bunker holes. Excepting when a bunker was almost filled with coal, or the barge was about being cleaned out, the tubs of coal would be hoisted at the rate of between 70 and 120 an hour, depending to a large extent, although not altogether, upon the height to which they would have to be hoisted. Upon some of the barges the tubs would go up as rapidly as 120 tubs an hour, or two tubs a minute (p. 691).

On cross-examination, the witness, Edward Powers, described these operations with some little detail:

“The speed with which the buckets go up depends, as I have heretofore testified, on a variety of circumstances, among others, the height to which the buckets are hoisted, the ability of the men in the hold, and on the engineer. Most of the ships require only a low hoist. The ‘Manchuria’ and the ‘Mongolia’ are up high, and the buckets would have to go, I should judge, about 25 or 50 feet to get up to the tripping place. The speed with which the buckets go up, depends, as I have said, upon the engineer. If he is nervy, he brings the buckets up and lets them down as fast as he can. The hatch-tender gives the signal for the bucket to start. It is pulled slowly until it gets clear of the barge; then he gives another whistle, and the bucket comes a good deal faster. The speed with which the buckets go up also depends upon the condition that a particular bunker may be in, that is, on whether the bunker is comparatively empty or comparatively full, for instance. When you commence a bunker the work goes very fast, but towards the end it goes slower. On the ‘Melrose’, which has an automatic discharge, you can hoist about three tubs to two minutes. The hatch-tender and the different gangs do not work at the same rate of speed. Some are faster than others, just as one man may talk faster than another, and it also depends upon the engineer and sometimes the weigher” (pp. 901-2).

In discharging coal from barges, four tubs would be used, numbered consecutively 1, 2, 3 and 4. These tubs would be hoisted one after the other in the order in which they were numbered, three tubs always being in the hold while one was on the hoist (pp. 861, 691). To each of these tubs would be assigned two men who would attend exclusively to the particular tub to which they were assigned,

making in all, eight shovelers (pp. 860, 738). In addition to these eight men, there are also employed on a barge the engineer, the barge tender or keeper, a foreman of the barge and a hatch-tender (p. 738). The hatch-tender is a man that is highest in authority upon a barge (p. 901). While the barge is coaling a vessel, the hatch-tender stands directly over the hatch, gives the signals for the hooking on of the tubs, and the general operation of the buckets (pp. 738-9). As already explained, an average system of weights prevailed. The rule was to weigh a round of tubs, which would be the four tubs, one after the other, out of every sixty tubs discharged. Sometimes one tub out of every fifteen would be weighed. This last practice, however, was but seldom pursued.

As a matter of fact, as we will presently show, it frequently occurred that weights would only be taken two or three times a day or night, and that when weights were not taken, the assistant weigher, instead of standing by the hatch facing the tubs to observe whether they were evenly filled, would spend his time on other parts of the barge, frequently so far distant that the contents of the tubs could not by any possibility come within his observation.

TAKING WEIGHTS.

The right to designate when weights were to be taken devolved upon the government weigher. He unquestionably had the right to weigh the tubs

when he saw fit, and in fact to weigh any or every tub (pp. 747, 858). On the barges upon which the platform scales were located, when the weigher desired to have a round of weights taken, he would notify the hatch-tender who, in a loud tone of voice would call out to the man in the hold below "on the scales". As to this matter, David G. Powers testified:

"It was the custom to take the weight of four buckets at a time; that is known as a round of buckets. When the customs weigher wanted to take a weight he would holler down to the hatch-tender, 'On the scales'. Then the hatch-tender would holler down to the eight men below in the hold of the barge" (p. 691).

At the time this order was usually given, an empty tub would be descending, having just been discharged (p. 861).

This situation was described by Edward Powers, from whose language we quote:

"Q. When a weighing is taken, whereabouts is the first tub that is called for as a general rule, at the time when the customs-house man hollers out 'On the scales'?"

A. It may be in the air or it may be in the process of being dumped or it may be in the hold of the barge.

Q. Oftentimes the first tub is in the air, is it not?

A. Oftentimes it is in the air, yes; not in the air coming up but in the air coming down.

Q. In the air coming down?

A. Yes, sir" (p. 912).

That it was the hatch-tender who called out "On the scales", or made known to the shovelers below

that a weight was to be taken, is also made manifest by the testimony of Tony Belish, one of the barge shovelers, he stating:

“I would know when a weight was going to be taken because the hatch-tender would holler, ‘Give me a tub on the scales’. There are two different kinds of scales on the barges,—one a platform scale, and the other a hanging scale, the latter of which hooks on to the tub down in the hold. When the coal was to be weighed on the platform scales, the hatch-tender would call for a couple of men to come up from the hold on to the deck and give a hand and pull the tub over on the scale. *These men would come up to the deck before the tub came up.* After the men came up on the deck the shovelers in the hold would stand there and fill up the tubs. They would fill them up good, you know, load them. They would put a little more coal in the tubs when they go on the scales. The hatch-tender gave me a sign to that effect. He would say, ‘This fellow is going on the scale’, and would make a sign which everybody knows who has worked down there five or six years” (p. 1137).

And that while the assistant weigher would designate when a tub was to be weighed, the order would be transmitted through the hatch-tender, is also shown by the same witness’ testimony on cross-examination, he saying:

“Q. Now, the only sign you had, or only signal you had that tubs were to go on the scales was either a whistle, or the hatch-tender would say, ‘The tub is to go on the scales’?

A. Yes.

Q. That was the only sign you had, was it not?

A. Well, sometimes he gave me sign like that (illustrating).

Q. A sign like that?

A. Yes.

Q. That is to say, before you knew the tubs were to go on the scales?

A. Sure.

Q. Well, now, didn't the customs-house man tell you that the tubs were to go on the scales, or didn't he tell the hatch-tender that the tubs were to go on the scales?

A. The custom-house officer told the hatch-tender, and the hatch-tender told it to the men down in the hold.

Q. The hatch-tender would tell it out loud, would he not? He would call out loud, 'On the scales', would he not?

A. Well, there is three tubs in the pile, and one tub in the hatch, and they put more coal in the three tubs in the pile."

* * * * *

"Q. Did you ever hear the custom-house officer say 'On the scales'?

A. Very few times.

Q. Very few times. Did you ever hear the hatch-tender say 'On the scales'?

A. Yes, all the time.

Q. He said that all the time, that they were to go on the scales?

A. The hatch-tender, yes.

Q. And that was the signal that you had to know that the tubs were to go on the scales?

A. Yes."

* * * * *

"Q. Now, I will put it to you slowly, and see if you do not understand; whenever the hatch-tender wanted the tub to go on the scales, he said out loud, didn't he, 'On the scales'?

A. Yes, he sung out, 'On the scales'.

Q. And then all the men knew the tubs were to go on the scales, didn't they?

A. Yes" (pp. 1140-1142).

Immediately after the cry "On the scales" was given, either one or two men would be called up from the hold of the barge to assist in landing the tub on the scales. Their arrival on deck would precede the hoisting of the tub. This, of course, would occupy some few minutes of time. This phase of the operation is thus described by Edward Powers:

"Sometimes we brought up two men instead of one to help put the tubs on the scales. I would call them up by name. In answer to the question whether the men understood in that case that a weight was to be taken, I would say that I don't know what they thought. Sometimes it was not necessary to bring up men out of the hold. We might have the bargeman to help us, but that was not the general practice. There would be a sort of cessation in the hoisting of the tubs when the order was given for the men to come up from the hold. * * * The men who came up from the hold would help to pull the tub over and land it on the scales" (pp. 860-1).

On cross-examination, he further said:

"Q. Now, how do they get the buckets to the platform of the scales?

A. Well, he yells to the engineer 'On the scales', and the engineer comes ahead slowly until they reach the level of the scales, the platform of the scales, and he draws the tub toward him, and lets it go back again, and when it comes back again so that the men can get it, they grab the tail, that is a rope on each side of the tub—and put it on the scales, and at the same time the hatch-tender is pulling on the rope" (p. 906).

**TIME OCCUPIED IN WEIGHING AND RESULTANT ADDITIONAL
TIME TO LOAD BUCKETS.**

That some considerable period of time would be occupied in weighing a round of tubs, of course, is obvious. This fact has also been established by some of the testimony already cited. There is ample other evidence in the record to place it beyond dispute. According to Edward Powers, the operation occupied from 12 to 20 minutes, he testifying:

“It would take from three to five minutes to weigh each tub. The time in which the men would have to load the tubs remaining in the hold would be increased by the time which it took to weigh the tubs, which would be considerable” (p. 861).

And again, on cross-examination:

“Q. But when these buckets are to be weighed, four of them in a round, there is a little more time in the nature of the work in which to fill up these buckets, according to your testimony?

A. There is” (p. 903).

* * * * *

“Q. And while the custom-house weigher is taking that first weight some of those other tubs at least are still in the process of being filled?

A. Yes, sir.

Q. And is that in part what you have reference to when you say that the stevedores then have more time with regard to the filling of the tubs than when they are engaged in meeting the hook?

A. They certainly have more time, certainly” (p. 913).

The same character of evidence was given by engineer and hatch-tender, Sass, he stating:

“About fifteen minutes would be occupied to take the weight of four tubs” (p. 1099).

And shoveler Philip Ganesi, some of whose testimony will be again referred to later, was questioned upon this subject as follows:

“Q. When the weight was to be taken, you would put in fine coal, would you?

A. Yes, and give plenty of chance to fill them up.

Q. You had plenty of chance to fill them up, too?

A. Yes.

Q. That was because the four buckets were to be weighed in succession, was it?

A. Yes.

Q. And you had more time then to put in the coal in the buckets than you did when they were going up at other times?

A. Yes” (p. 1111).

As each tub had to be weighed separately and as after a tub had been weighed it would have to be hoisted, discharged and lowered into the hold before another tub could be raised to the scales, between ten and fifteen minutes would be occupied in weighing a round of tubs (pp. 861, 691).

When weights would be taken upon a hanging scale, the same procedure would be gone through excepting that it would be unnecessary for any men to leave the hold of the barge.

It will thus be seen that when weights were called, the men in the hold of the ship were af-

forded ample opportunity, if they desired, to so load the tubs that were to be weighed that their weight would not be representative of the tubs that were not weighed. That this opportunity thus afforded them was not only taken advantage of by the men, but that such conduct directly resulted from positive instructions emanating from the defendant Mills, with a knowledge of the defendant Smith, cannot be gainsaid in the face of the record. That the buckets were not evenly filled and when weighed, were excessively overloaded, is demonstrated not only by the existence of the overage itself but by the positive and convincing evidence of the witnesses.

WEIGHTS INFREQUENTLY TAKEN.

According to the testimony of David Powers:

“The custom-house weighers and the Pacific Mail Steamship Company weighers would take about three weights a day, and sometimes four or five, and then they would take an average and fill in the other weights and tally the tubs that went up during the day” (p. 688).

On cross-examination, in stating what he observed with reference to the frequency of taking weights when he was first employed by Mr. Mills in 1902, he testified:

“I noticed right away that while it was supposed to be the custom to weigh one bucket in every fifteen, as a matter of fact that was not done. ‘A blind man could see that through spectacles’. I became aware of it the first few days I was there * * *” (p. 737).

Edward Powers, in giving evidence upon this subject, said:

“Generally, it was the practice while I was on the barges to weigh a round of tubs. Some weighers would take one round in every 15, and some about once in every three or four hours. It depended altogether upon the personnel of the weigher. The general practice of the Government weighers was to take a round of weights about three to five times a day. I would say that the maximum time intervening between the taking of weights would be three or four hours. That was quite frequently the custom pursued by the weighers” (p. 858).

And again:

“The weights would be taken at night-time the same as in the daytime. I know nothing about the number of weights that would be taken at night-time during the two years when I was dumping. When I was hatch-tender, prior to the fire in San Francisco, weights would be taken ever two or three or four hours. I have never known them to take weights only once or twice during the night. Sometimes they would hoist about 20 tubs an hour and sometimes maybe 80 tubs an hour. The taking of weights every two or three or four hours would occur whether the tubs were moving rapidly or slowly” (p. 859).

And still later:

“Q. You have testified, Mr. Powers, that weights would sometimes not be taken for 3 or 4 hours, upon one of these barges; is that true?

A. That is true.

Q. Is it not a fact that in those instances, or rather, in a great many of those instances, the tubs which were not weighed did not con-

tain as much coal as the tubs which were weighed?

A. That is true" (p. 864).

This testimony was directly corroborated by Special Agent John W. Smith, who, on the night of December 18, in company with David Powers and Mr. Enlow, acting under instructions from Mr. Tidwell, made observations relative to the coaling of the "Korea" by the barge "Wellington". They remained at their station making observations from 7 o'clock in the evening until 5 the next morning, excepting from 12 to 1:30 and for half to three-quarters of an hour between 3 and 4 o'clock (pp. 1004-5). Between 7:30 and 12 o'clock, but two weights were taken (p. 1005). Between half past one and 5 o'clock but one weight was taken (p. 1006). According to Enlow, they remained on watch until 6 o'clock the next morning, leaving at midnight to get something to eat, during which time hoisting operations were suspended, and also leaving again for a short time to investigate a case of smuggling (p. 1049). He stated that there were two weights taken that night between 7 o'clock and 12 o'clock, four tubs being weighed at 8:30 and four at 11:10 P. M. Only one weight was taken between 1 o'clock and 6 o'clock, when four tubs were weighed at 2 A. M. (p. 1050).

This testimony was directly corroborated by David Powers, the third man present that night, who said:

"Three weights were taken that night, and only three, that is, from six o'clock at night until six o'clock in the morning" (p. 709).

And according to the testimony of Jim Balestra, no more than two or three weights a day would be taken, and at night ordinarily but one weight would be taken, he saying:

“While I was thus working as a shoveler on the barges I was familiar with the manner coal was hoisted from the hold of a barge and dumped into the ships or liners. The frequency with which weights would be taken by the custom-house weighers varied. I would say that normally it would be about two or three weights a day. At night we generally took one weight just after we started to work and another one before we got through in the morning. When I worked in the daytime I commenced at seven o’clock, and worked until twelve o’clock, and then started at one and worked until five. When I was on overtime I sometimes worked all night” (pp. 1118-1119).

A similar version of the frequency with which weights were taken was given by Tony Belish, he stating:

“Sometimes weights would be taken four or five times a day and sometimes three times a day. At night weights would be taken from two to four times” (pp. 1136-1137).

The number of weights that were taken during the daytime, while the “Korea” was being coaled by the “Wellington” were not as frequent as they should be. David Powers says:

“I don’t believe they took four rounds out of sixty. I think the tubs were going up at the rate of about sixty an hour. They weighed tubs four in succession. They would weigh about one in ninety. My best judgment is that about an hour and a half elapsed between the weights” (p. 818).

It also appears that Enlow made observations upon other occasions, and states that on January 6, 1913, while watching the operations of the barge "Comanche" discharging into the "Siberia", but one weight was taken from 1 P. M. to 3 P. M. (p. 1051).

The testimony of Parks, the official weigher of the Pacific Mail Steamship Company, itself would tend to show that the Government weigher was often absent because we find that not only were comparisons frequently made while coal was being discharged, but at the end of each day they would go over their respective books and reach some agreement as to weights, Parks stating:

"Q. How often did you compare with the custom-house weigher your figures, either as to the weights or as to the number of tubs that were hoisted?

A. About every few minutes, about 5 or 10 minutes, or if he was not very close to me a signal would signify how many tubs he had, and so we compared it.

Q. Will you state whether or not you compared with the custom-house weigher at the close of the day the total tonnage that had been hoisted on the steamer?

A. Yes, sir, we make up our books at 5 o'clock and we both agree as to the amount and everything is correct" (p. 1523).

Further along in his cross-examination it was shown that according to his tabulations, a particular tub would contain a certain quantity of coal when weighed and when next weighed would contain the same quantity of coal, even to a pound. Upon other

occasions a particular tub, each time it was weighed, would apparently have in it an exact ton (p. 1515). These figures are consistent with the Government's evidence that weights were from time to time filled in.

LIGHTS AT NIGHT.

A considerable quantity of the coal supplied to vessels would be discharged at night. During these operations but few lights would be located upon the barge; only a sufficient number would be used to permit the operations to proceed. Concerning this matter, David Powers testified:

"A man would have to stand right over the hatch at night in order to see the contents of the tubs. As to lights, the Western Fuel Company owned about four or five lanterns, and the steamship company, I think, would produce one light, an electric light, which was located up high so that the engineer could see the bumper. Sometimes there would be two lights up at the bumper. The actual height of the bumper, and therefore of the lights, would depend upon the height of the ship; so that sometimes you might be close down to the deck, and at other times 50 or 60 feet from the bottom of the barge. There were no lights other than those which I have mentioned, except a small lantern which Mr. Parks used to use to look at the scale. The lanterns on the barges were ordinary coal oil and swinging lanterns, and were the only lights in the vicinity of the hatchway except the electric lights that I have mentioned. It would not be possible to see the amount of coal in the tubs at night except when the tubs were actually being weighed, unless a person were standing in the immediate vicinity of the hatchway" (pp. 706-7).

Edward Powers' knowledge upon this subject is also instructive:

"When we were coaling a ship at night we had some bulkhead lanterns there, that is, ordinary lamps fitted into a box or cage; and the steamer which we were coaling was supplied with electric lights on the side of the ship, and an electric light cluster shone right into the hatch. There were also some lights up near the falls near the bunker. I hardly think it would be possible for a person who was on the deck of the barge and removed some distance from the hatchway to see the contents of the tubs as they would rise at night" (pp. 864-865).

Further along, in again referring to the matter, he said:

"Generally, when we were discharging barges at night, electric lights were supplied by the steamship company, that would throw the light into the hold of the barge. There were also the box lanterns belonging to the Western Fuel Company. The electric cluster was arranged as the hatch-tender or the custom-house weigher wished it to be. Usually that was in such a way that it would throw the light down into the hold of the barge. I would put one of the box lanterns in each wing of the barge where the men would be working, and also one in the hoist so that the engineers could see on each trip the proper time for dumping the tub. The light sometimes went out. In such event they went on the work just the same so long as the box lanterns were lit. If a man were standing right at the hatch of the barge, he could thus, with all the lights going, see how the tubs were loaded as they ascended" (p. 917).

On the night upon which Smith, Enlow and Powers were watching the "Korea" coal, there was not sufficient light for them to see into the hatch of the barge (p. 1005).

That the Western Fuel Company were as economical with their lights as they were with their coal is apparent from the testimony of Robert Sass, a shoveler. He said:

"Sometimes I worked at night on the barges. I could not see the quantity of coal in the tubs, however, very well from my station in the engine-room. Regarding the lights, I would say that I have seen times when they would have to have two clusters of electric lights from off the steamer, and a couple of box lamps. The Western Fuel Company furnished the latter, while the electric lights came from the steamer. *A man would have to stand right over the hatch at night in order to see the coal contained in the tubs*" (p. 1098).

Later on, on cross-examination, the same witness said:

"It is about 25 feet from my engine-room up to the hatch-way. At night time they always had a cluster of electric lights shining down into the hold below. There are also two box lanterns placed by the custom-house men, one forward and one aft. While standing twenty-five feet away, as the buckets went up, you could not see what was going on at night, as to whether they were filled or not, but you could see the bucket when it was put on the scales, where there was a lantern" (p. 1102).

USUAL LOCATION OF GOVERNMENT WEIGHER.

In view of the situation shown by the evidence, it is obvious that in the proper discharge of his duties the government weigher would have to remain while on duty, constantly at the hatch of the barge, watching the tubs as they would be hoisted out of the hold of the barge. Unless he were in this position, it would be impossible for him to tell whether the tubs were, or were not evenly filled. That this was not the position ordinarily occupied by him, particularly at night when more care and caution was required, is made clear.

Touching this matter, Edward Powers testified:

“When weights were not being taken the weigher would sometimes be right at the hatch, and sometimes he would be walking around the deck of the barge, and sometimes smoking. Once in a while they would go inside of the cabin. When coal had to be weighed at night and it was raining, some of the weighers stayed right at the hatch. The others of them went into the engine-room shed, and stayed there sometimes for some time” (pp. 858-9).

“If the Government weigher were in the engine-room, and particularly at night, I doubt whether he would be able to see the quantity of coal which was contained in the tubs that were hoisted from time to time and were not weighed, but I would not say that he could not see them. I have never seen the Government weigher in the cabin. I have seen him walking up and down the barge. I have not watched him closely enough to say whether he would turn around when each tub came up. It is true that he would sit down upon the barge smoking while this hoisting was going on” (pp. 858-9).

David Powers, in showing the position sometimes occupied by the government weigher, said:

“Sometimes it rained at night. The custom-house weigher would ordinarily stand near the boiler at night to keep warm or else in the cabin. On other occasions he would walk up and down the barge. The Government weigher would not station himself near the hatchway except when the tubs were actually being weighed” (p. 707).

Upon being cross-examined as to who these weighers were, David Powers names Mr. Hoberg, and upon being pressed said:

“Q. Is he the only man that you can name?

A. No; if I went ahead and named them, I would name them all, if I could remember all their names.

Q. Name them?

A. I don't remember all their names.

Q. Well, does that apply to every custom-house weigher, the answer that you have made with respect to Mr. Hoburg, does that apply to every custom-house weigher that you have seen down there?

A. It applies to the majority of all of them, I guess.

Q. Now, I am just going to ask you the question once again that I asked you: Is there any other one of them that you can name outside of him?

A. I said there was all of them, or pretty near all of them. Of course, there are exceptions to the rule” (pp. 831-2).

While the witness, John W. Smith, on the night of December 18, was watching the “Korea” coal, it was impossible for him to see the government

weigher when the weights were not being taken, he stating:

“Four tubs were weighed upon each one of those two occasions when the weights were taken, one after the other. I do not know where the Government weigher was located when the weights were not taken. * * * I don't remember seeing the weigher around except when they were taking weights” (pp. 1005-6).

Enlow, watching with Smith, testified:

“On the night to which I have testified I could tell just where the Government weigher was located, but could not recognize him well. When weights were taken he came up to the middle hatch from up forward on the barge. When weights were not being taken, he would be just about where the bulkhead of the vessel would be. I remember seeing a lantern kept at that place. That was about 30 or 40 feet from the hatchway. I suppose the weigher was tallying coal. I could not, however, see him actually doing so” (p. 1051).

Of course the elevation of the tubs between the deck of the barge and the tripper could be observed from a considerable distance on account of the lights located near the place where the tub would dump (p. 1104), and while the tally of the tubs thus hoisted could be readily kept, as the evidence already shows, and this without conflict, the condition of these tubs, respecting the extent to which they were filled with coal, could not be determined.

Respecting the position of the weigher when weights were not being taken, the witness Robert Sass, who, for some time was employed as engi-

neer on four of the barges, and at other times tended hatch, testified:

“When weights would not be taken the weighers would sometimes walk up and down the deck, and sometimes come into the engine-room to warm themselves. I was in the engine-room myself. At other times, the weigher would sit around the hatch watching. He would not sit in the engine-room very long, perhaps five or ten or fifteen minutes at a spell. You could only see a part of the deck of the barge from where I was operating my engine, because it was so dark” (pp. 1098-99).

And as to what would occur in rainy weather, is also shown:

“It was generally at night or in rainy weather that the United States weigher on the barges would go into the engine-room and stay ten or fifteen minutes to warm himself” (p. 1102).

It might be well for the court to remember that not a single assistant weigher was called to the stand by the defendants, either to testify to the proper performance by him of his duties, or to assert that when engaged in the weighing of coal on barges, his location was such that the contents of the tubs and the extent to which they were filled, could be noticed.

ABILITY OF SHOVELERS TO PERFORM WORK DETERMINED BY RECORD SHOWING OUT-TURN WEIGHT OF COAL.

It occasionally happened that work would become slack and that consequently some of the stevedores and shovelers who, by the way were paid by the

hour, would be laid off. This would be done by the hatch-tender, acting under the direction of Mills (p. 837). At other times the men would be laid off because they could not do their work. As to what was meant by this phrase, the witness, David Powers, testified:

“Q. That is just what I am trying to get at; you say they could not do their work; in what respect could they not do their work?

A. Well, they could not get out the amount of coal that was supposed to have been gotten out.

* * * * *

Q. That is, because he was not able to do his work, not able to fill the loads sufficiently; how often did that occur?

A. Oh, at different times that I was there.

Q. And do you know that of your own knowledge, that men were discharged for that reason?

A. Yes, sir” (pp. 839-840).

The method of determining whether a shoveler was able to do his work was aptly described by the witness, Edward Powers, as follows:

“Q. How would you determine the quantity of coal which each gang of men handled from time to time? Would it be determined by the number of tubs that went up or by the weight of the coal that was hoisted during the time each gang was on duty?

A. By the weight of the coal.

Q. And it is a fact, is it not, Mr. Powers, that the weight of the coal which was discharged by each particular gang *was determined by the weight of the buckets which in fact were weighed?*

A. *That is true.*

Q. *And by those buckets alone, taken as an average; is that true?*

A. *That is true*" (pp. 975-6).

And again:

"Q. Let me put one other question to you upon that subject, Mr. Powers: Is it not a fact that if a man employed upon one of these barges as a shoveler was not able to shovel the amount of coal which the hatch-tender or the Western Fuel Company believed he should shovel, ascertained by the outturn or Government weight of the coal shoveled, that he would be discharged; in other words he would be, to use the language of the barge, given the hook instead of being permitted to meet the hook?

A. They were supposed to fire him if they could get a better man in his place" (pp. 978-9).

Inasmuch as the weight of coal discharged from a barge was determined by average weights, it is obvious that if the buckets that were weighed were substantially filled, or filled to their uttermost, while of considerable importance to the Western Fuel Company it would be of little consequence to the shovelers in the hold of the barge whether the tubs not weighed were adequately or inadequately filled. If the ability of the shovelers to properly discharge their duty depended altogether, as the undisputed evidence shows, upon the record of the coal discharged from the barge, and the tubs that were weighed were kept well filled, the permanency of their respective positions was assured to them however short of honest weight the remaining tubs were loaded.

While manifestly fraudulent practices will not be imputed merely because of opportunity alone, yet, as we will presently see, the facts in this case establish not only that the opportunity thus afforded was embraced, but that such action was compelled in order to avoid immediate discharge. The hatch-tender who, as the evidence will show, directly or indirectly coerced the shovelers to load tubs weighed and underfill tubs not to be weighed, was the immediate representative of defendants, Smith and Mills. With him rested, at least in the first instance, the permanency of the shovelers' employment (p. 1315).

FULL DUTY NOT PERFORMED BY UNITED STATES WEIGHER.

It of course is not claimed by the Government that every assistant weigher in its employ, engaged in weighing coal that was supplied into vessels, with benefit of draw-back, or into transports or other government vessels, was dishonest or acted dishonestly, or was guilty of negligence. It is likewise not claimed by the Government that every time a bucket was weighed, it did not adequately portray the condition of the tubs that were not weighed, nor is it the Government's attitude that every tub of coal that was not weighed was inadequately filled. That some of the weighers did not conscientiously discharge the duties imposed upon them by virtue of their employment; that other government weighers were derelict in the discharge of their duties; and that yet others were guilty of the grossest kind of

negligence, is attested not only by the overages themselves, but by the difference in the amount of overages existing in concrete and specific cases.

It is needless to assert that in the proper discharge of his duties, the position of the weigher should have been at the hatch. Walking up and down the deck of a barge, locating himself in the cabin, or behind the bulkhead, or sitting down at either end of the barge while engaged in a quiet smoke, did not comport with the proper or faithful discharge of his duties. Nor was he, while occupying these voluntarily assumed positions upon the barge, afforded the opportunity of observing the very conditions, to acquire knowledge of which, he was employed.

This condition of lassitude and inertia on the part of the weighers is readily traceable to the practice of the Western Fuel Company secretly, yet consistently, carried on against the regulations of the Government, in paying to the assistant weighers \$1 an hour as overtime, to which they were not entitled, and for which overtime, they were allowed a corresponding period of relaxation by the Government. For a number of years prior to 1906, the assistant weighers were paid a per diem, that is, they were paid for the days they actually worked. Subsequently, between March, 1906 and 1911, they were placed upon a regular salary, payable in monthly installments, with Sunday off (pp. 1279-80). For a number of years prior to 1906, when the weighers worked overtime, they presented bills to the surveyor, which

were by him turned over to his cashier for collection. As stated by Cook:

“The assistant weighers would be actually paid not by the importer direct, but through customs sources” (pp. 1274-6).

The witness Blinn, a deputy collector of customs, testified to the same point (pp. 1272-3).

In March, 1906, an order was issued by the Department prohibiting this practice. Accordingly, from that time forward, until 1911, no overtime would be allowed the assistant weighers, but they would be entitled to time off for all extra work they performed (p. 1273). Between March, 1906 and 1911, whenever a weigher did work overtime, he actually received, and took his time off. Cook testified positively upon this matter, he stating:

“No compensation was paid in money to the assistant weighers between March, 1906, and January, 1911, for night overtime service. We were, however, authorized by the department to compensate an assistant weigher for such work as he rendered at night by allowing him a day off subsequently. *I know as a fact that such an allowance would be actually made and taken advantage of by the weigher*” (pp. 1274-5).

It also appears from the testimony of this witness that the Government received no compensation for any time off that it allowed its assistant weighers (p. 1275).

The regulations of the customs department, of which the court will take judicial notice,

Caha v. U. S., 152 U. S. 211; 38 Law Ed. 415,

require the weighers to make an affidavit when collecting their salary, the statements in which are inconsistent with the idea that overtime or gratuities have been received by them from the importer (p. 1273). Notwithstanding this situation, payments were made from time to time by the Western Fuel Company, to assistant customs weighers, representing overtime, for which time off was given by the Government. According to Bud Hopkins, an employee of the Western Fuel Company, this overtime amounted to between \$250 and \$300 a year (p. 1281). An examination of one of the time books, however, disclosed that \$240.50 had been paid for this service between June 1 and December 31, 1910 (p. 1281).

That these payments were wrongful and known to be such, can be readily concluded from the manner in which they were made, and the character of records kept by the Western Fuel Company concerning them. Speaking to this subject, Bud Hopkins testified:

"I have knowledge concerning payments made to assistant customs weighers by the company representing compensation for overtime between the month of June, 1907, and the early part of 1911. The money was paid to the assistant weighers by the defendant, Eddie Mayer. He in turn obtained the money from me in cash, and I got it from the cashier, I. H. Story. * * * I could not say whether Mr. Mayer took a receipt from the assistant weighers when he gave them this money. I kept the time for the stevedores, and paid them myself by cash, and I took a receipt

from the stevedores for each amount of cash thus paid. I kept regular weekly time-books. * * * When I paid an employee for the week he would sign his name on the time-book. Mr. Mayer would sign in the time-book for the money that I gave him to be by him paid as compensation to the assistant weighers. I have no recollection, however, of any assistant weigher signing his name to any one of these time-books for compensation paid him, or of his signing any other paper. * * * In most every case I used a particular number in the time-book opposite which to insert the compensation paid by me to Mayer for these weighers, and that number was 96 as a rule but not necessarily 96. The dates appearing on the time-books would be those on which the money was paid, and that day would be a Saturday" (pp. 1280-2).

The defendant Mayer likewise admitted the existence of the practice complained of. After testifying to the receipt of the money from Paymaster Hopkins, whose duty it was to pay to the company's employees their salaries, he stated:

"Q. When you made the payments of money for overtime to the custom-house weighers, did you make any memorandum of the fact of the payment?

A. Sure; I put it in my book to get my money.

Q. In what book did you make a memorandum?

A. I just put it on a piece of paper and gave it to the timekeeper.

Q. And the timekeeper made an entry in his book, did he?

A. Yes, sir.

Q. And during those years; between 1906 and 1912, when the weighers did work over-

time, and you would be on the bunkers, you always paid them the overtime, did you not?

A. I did, yes, sir.

Q. At that time, did you know that the weighers who worked overtime were always allowed by the Government a day off for overtime at night?

A. No, sir.

Q. When you paid this overtime to the weighers, did they sign any receipt or acknowledgment of the payment?

A. No, sir.

Q. When you made a report to the paymaster of the payments of overtime did you give the names of the weighers?

A. No, sir.

Q. Whose name was signed to the memorandum that you gave to the paymaster?

A. My name.

Q. Is it not a fact that you signed your name to the time-book showing the payment?

A. Yes, sir, I signed the pay-roll for that money.

Q. Why didn't you insert the name of the weigher to whom you gave this overtime?

A. Because it was not the custom" (pp. 2022-5).

The donation account already referred to discloses several gratuities in the nature of coal delivered to some of the weighers.

OVERAGES ON BARGES DUE TO FRAUDULENT CONDUCT IN FILLING WITH HEAVY COAL THE WEIGHED TUBS, WHILE THOSE THAT WERE NOT WEIGHED WERE BUT PARTIALLY FILLED.

Up to this point we have followed the coal from its initial discharge at the bunkers of the Western Fuel Company into the barges, and from the barges

into the bunkers of the vessels to which it was delivered,—vessels with and without benefit of drawback, transports and other Government vessels. We have shown how coal thus laden upon the barges, oft-times within sixty-eight hours, at other times within four or five days, and still at other times within ten days or two weeks, would apparently increase in weight five, ten, fifteen, twenty, and in some instances thirty and forty per cent beyond its actual weight at the time it was checked into the barges. We have pointed out how the engineers on the vessels thus coaled complained to their superior officers and to those in authority in the Western Fuel Company, without avail, and how the Western Fuel Company through gratuities consisting of tons of coal and small amounts of cash effectually sealed the lips of employees and of officers of the Pacific Mail Steamship Company, so that no outcry or protest against the frauds being perpetrated would emanate from them. We have even seen how some of the Government employees, sworn to faithfully perform the duties incident to their employment, failed to measure up to the required standard, and we have seen how they too became tainted by the venom resulting from occasional tons of coal and moneys paid by way of overtime.

We are now about to develop the story showing how these overages were brought about, and demonstrate by evidence, the strength of which cannot be diminished or its effect overcome by arguments imputing motives of hostility to Government wit-

nesses, that they were caused, not by moisture content or oxidation, but by specific criminal acts of fraud perpetrated in furtherance of the conspiracy set forth in the indictment.

First, however, a word as to the Powers Brothers.

The Powers Brothers.

In the brief filed by the plaintiffs in error, David Powers is characterized as a "spy", an "informer", and a witness "bought and paid for" by the Government. Of course counsel recognize the futility of hurling epithets of like character against Edward Powers, so they content themselves with asserting that he was "bitterly hostile against defendants". Likewise we realize that arguments of this character are entitled to no consideration at the hands of an appellate tribunal. Eloquence couched in such language should be confined to the argument made to the jury, in which, in the instant case, it was freely indulged. The hostility of a witness, his motives, his expectations, if any, his demeanor upon the stand, are all matters, the consideration of which is purely within the province of the jury. Its conclusion upon these matters is final and conclusive. Unless the evidence of a witness is so inherently improbable as to be impossible of belief, it cannot be rejected by this court. In this case such a situation, however, is not presented by the record, because whatever may have been David Powers' shortcomings, his testimony is not only believable, and inherently probable, but is vouched for and corrobor-

ated by a mass of other evidence, the verity of which cannot be successfully denied.

Neither the United States Government, nor any of its officers, is engaged in the business of buying perjured evidence. The assertion that Powers was "bought and paid for" is a mere gratuity flung into the argument by counsel for plaintiffs in error, in an apparent endeavor to lessen the effect of his testimony, without foundation and without reason. It is true that David Powers testified that Mr. Tidwell spoke to him about the payment of the reward authorized by the statute, but this was not until after Powers had completely revealed the facts within his knowledge. Before calling upon Mr. Tidwell, Powers had disclosed to Mr. McMasters, Mr. Gleason and Mr. Mayer, reporters upon local newspapers, the major part of the facts which were known to him about the practices of the Western Fuel Company (p. 840). He believed he was about to be called before the Grand Jury to be questioned concerning them. It was at the suggestion of Mr. McMasters that he called upon Mr. Tidwell and related to him what he knew (p. 840). And that this statement preceded any knowledge on his part that under the statutes of the United States he might participate in a reward, or would otherwise be benefited, is conclusively shown by testimony which is not contradicted.

Says Mr. Powers:

"Q. You have said upon cross-examination that Mr. Tidwell did speak with you concern-

ing your receiving a proportion of the amount of money, being the duties on the value of the coal out of which the United States had been defrauded, and that in your mind, if you were paid that reward, you would get in the neighborhood of \$7,000, or one-quarter of some \$28,000?

A. Yes, sir.

Q. Before Mr. Tidwell touched upon that subject either directly or indirectly, had you narrated to him all the circumstances and facts within your knowledge relating to this particular controversy?

A. Yes, sir" (pp. 840-1).

But whatever may be said about the willingness of David Powers to testify as a witness in this case, the circumstances of which were fully narrated by him and not contradicted, no legitimate criticism of any kind can be leveled against the character, reputation, fairness or truthfulness of his brother, Edward Powers. This witness had been under subpoena by the Government for over one year, because of which fact he had been unable at times to accept employment on vessels leaving San Francisco. Prior to the moment he was called to the stand he had positively and unequivocally refused to give the Government any information of any kind relative to any of the facts involved in this controversy (p. 853). He had been examined before the grand jury and while there, his attitude was that of an unwilling witness. That he was friendly disposed towards the defendants is not only shown by his evidence and demeanor while on the stand but by the

circumstance that at the conclusion of his examination before the grand jury, upon the invitation of Secretary Norcross, he voluntarily went to the office of the attorneys for the defendants and there responded to every question that was put to him. This situation, disclosed by his testimony, was not even attempted to be contradicted or disputed (pp. 965-970).

After testifying to his acquaintance with the various defendants, and the friendly relations existing between them, he said:

“Q. Prior to the moment you took the stand here, which was within the last few moments, had you ever made any statement of what you knew concerning this case to the attorneys representing Government?

A. I have.

Q. When?

A. At the office of Olney, McCutchen & Olney, Mr. Moore being present.

Q. I am talking about the Government's attorneys now.

A. No. (Last question repeated by reporter.)

A. I did not.

Q. You did not?

A. No.

Q. Have you been requested upon various occasions by the attorneys representing the Government to advise them, or one of them, of the facts within your knowledge relating to this case?

A. I have” (pp. 853-854).

That he was an unwilling and hostile witness, so far as the Government was concerned, until his

lips were unsealed and his knowledge released by a tactless cross-examination, can be readily ascertained by reading his testimony. By evasive replies, by refusing to volunteer, by failing to give definite responses to pointed questions, there was manifested throughout his direct examination a determination not to voluntarily permit any word to escape him which might have a tendency to injure any one of the defendants. That even the hope of reward if he divulged what he knew failed to remove this seal of silence from his lips, or cause him to become disloyal to the traditions of his race is evident from one phase of his testimony, developed upon cross-examination, from which we quote:

“Mr. Tidwell has said something to me with respect to a reward. He asked me to tell him something about the Western Fuel Company, and I refused and he went on to state that there was a reward offered for any informer, and I told him neither he nor the United States could make an informer of me; that is the stand I took. That conversation took place in January or February 1913; it may be December. He only spoke to me once about the matter of a reward” (p. 956).

And later, he said:

“Q. You have now related to us all that has been said as between you and Mr. Tidwell in regard to any reward?

A. Well, when Mr. Tidwell told me there was a reward and he got his answer, he never broached the subject again” (pp. 960-961).

This witness not only was hostile to the Government, but likewise was unfriendly towards his own

brother, David G. Powers, evidently because he felt that he should not have volunteered information against the defendants (p. 953).

According to the evidence already impressed upon the recollection of the court, ordinarily when the Government weigher indicated that weights were about to be taken, and the call of "On the scales" was communicated to the shovelers in the hold of the barge, a tub was being either elevated to the tripper or, having been dumped, was descending. In some instances by positive instructions, in others by signals from the hatch-tender, and in still others by complaints to the men when tubs to be weighed were not filled to their uttermost, the men to whom was assigned the duty of filling the tubs realized that to retain their positions it was essential that, where it could be safely accomplished, the tubs that were to be weighed should be filled to their utmost with the heaviest kind of coal, while those that were not to be weighed should be but partially loaded.

Cause of Averages.

The weight of the coal discharged from the barges was determined by averages. While of course it could not be expected that each tub would be so loaded that the weights of all tubs would agree,

nevertheless, if all of the tubs were kept evenly filled—those that were not weighed as well as those that were weighed—the average weights determined by the weighing of tubs, whether one out of fifteen or four out of sixty, would approximate the actual weight of all of the coal. In other words, whether any deviation from actual weights would occur, in weighing the tubs, it was something that would finally even itself out.

Secretary Norcross of the Western Fuel Company put this proposition in apt and convincing language. We quote from his testimony:

“Even though the coal from the barges is weighed by averaging the tubs, if the weights are taken fairly, honestly and accurately, the tubs which are weighed will give approximately the weight of the tubs which are not taken. So that even though the weight of the coal discharged from barges is an average weight, that average weight will, if all the tubs are similarly or approximately filled, represent almost the actual weight” (p. 243).

The manner in which coal would be discharged from the barges, resulting in the overages disclosed by Mills' books, was succinctly pointed out in the evidence of David G. Powers. As far back as 1902 to 1904, according to this witness,

“The method pursued by the Western Fuel Company in such discharge from barge to vessels was as follows: the tubs would go up about three-quarters full, and when they were being weighed they would be heaping full” (pp. 687-688).

Later on, when employed by the Western Fuel Company, the cause for the overage was again pointed out by him. Upon this subject he said:

“The difference between the method pursued in taking coal out of the hold when a round of tubs was being weighed, and the method pursued in hoisting the tubs and discharging their contents into the boat was that the buckets were being discharged into the steamer, they were going up about three-quarters full and there were about 120 tubs an hour, that is about two a minute, or 1120 lbs. net weight. * * * I would frequently observe that after the cry ‘On the scales’ had been given the coal shovelers would go right into the fine coal; one man would shovel in fine coal and the other man would put in the lumps, I mean the fine coal to fill in the spaces, and they would fill the tub to overflowing and put it on the scales” (pp. 691-692).

That a tub loaded with both fine and lump coal would weigh the most was attested by the witness Parr, one of the experts afterwards called by the defendants, who claimed to have made experiments upon which this evidence was given (p. 1628). It was also testified to by Edward Powers (p. 872).

The court will remember that when coal was discharged into the barge, the fine coal ran along the center line, the lump coal falling to the sides and wings (p. 870). It was into this fine coal that the shovelers would go when tubs were to be placed upon the scales. The witness David Powers further testifying:

“When coal was not being weighed the shovelers would always try to get the wing coal,

the lump coal, first, taking only such fine coal as came along incidentally. There would be two tubs working forward and two working aft. When weights were not being taken a few lumps would be shoved into the buckets and a few shovels of fine coal, and they would go up about three-quarters full. As to the method in which the tubs were loaded, they were turned on their sides, and the coal scooped in, but when weights were taken they would shovel the coal into the tubs. When the tubs were not being weighed the coal was scooped into them, and they would go up half full. *When the tubs were being weighed one shoveler would shovel in the fine coal and the other would throw in the lumps. That was an every day occurrence*" (pp. 693-694).

At the time David Powers became hatch-tender, the defendant Edward J. Smith became checker on the barges. As to what then occurred Powers testified:

"When the Government weigher wanted a weight, he would communicate his desire to Mr. Smith. Smith would holler, 'On the scales'. I could see the tubs of coal before they would be hoisted to the scales when a weight was desired and also the tubs to be hoisted when no weights were being taken. I could also see the shovelers down in the hold of the barge. When the tubs were coming up and being discharged into the steamer without being weighed they were about three-quarters full; but when they were being placed on the scales they would be heaping up, and this would occur in the presence of the defendant, E. J. Smith. *When tubs were being weighed the shovelers would always put fine coal in and lumps; one man would throw lumps in and another man fine coal*" (p. 700).

In describing his experience while watching the "Korea" being coaled on the night of December 18th, 1911, in company with agents Smith and Enlow, he further testified:

"When the tubs were being weighed they were overloaded, heaping full, and when they were not being weighed they went up very light. Sometimes, indeed, they had to send the tubs back to put more coal in them, because they did not contain enough coal to trip at the bumper" (p. 709).

As stated by this witness, if the bucket were less than three-quarters filled, unless the coal was spread towards the lip it would not dump at the tripper, consequently it would have to be returned to the hold to have more coal placed in it.

Respecting the discharge into the "Korea" this witness, on cross-examination, further testified:

"You could see the tub when it hit the bumper when the light flashed on it. We could see the tubs and what was in them when they were overflowing at the time the weights were being taken; but you could not see exactly the contents of the tubs otherwise until they got right up to the bumper and the electric light" (pp. 835-836).

The evidence last given is corroborated by the testimony of Special Agents John W. Smith and E. D. Enlow. The former had observed the coaling of the "Korea" during the day time on the 16th and 17th of December, 1912, and then again on the afternoon and night of the 18th and the early

morning of the 19th (pp. 1001-2). Speaking of the condition of the tubs he said:

“The tubs which were weighed were in every case heaping full, well rounded out, and the tubs which were not weighed were hardly ever rounded out. To my recollection none of them were as full as the ones that were weighed. In the case of the tubs that were not weighed, the coal would sometimes be below the top of the tub. It would quite often be that way. To my recollection, though, I could not say positively none of the tubs that were not weighed were rounded out as full as the ones which were weighed. Referring still to the daytime, it appeared to me that the tubs that were weighed had more fine coal in them than the tubs that were not weighed” (pp. 1003-4).

This testimony related to what he had seen in the day time. As to what occurred on the night visit he testified:

“On the night of the 18th, when weights were not being taken, some of the buckets were only fairly filled. Some of them, to the best of my recollection, were not half full. *There were several times when they had difficulty tripping the tubs at the point of discharge. Sometimes I could not see the quantity of coal in the tubs upon these occasions when there was difficulty in tripping them.* There was not enough coal in the tubs for me to see it, though I could see at least a foot down in the tub. In the day time the tubs that were not weighed were better filled than they were at night” (p. 1006).

He then describes the condition of the tubs during the early morning hours of the 19th.

“The weighed tubs were well filled, and the unweighed tubs were not well filled. The situation was about the same in this regard as in the earlier part of the night, except that in the morning near five o’clock the unweighed tubs appeared to me to be better filled when they came up” (p. 1006).

The quality of coal contained in the tubs, as to fines and lumps, was brought out on the cross-examination of this witness, his testimony there being:

“The weighed tubs were all well rounded out, and had a good deal of fine coal in them. I could see them dumping. That is the only way I know the character of the coal. Some of the tubs that were weighed had more lumps in them than others; but, in taking them one with another I would say that they were filled with about the same character of coal and were well rounded out; that is to say, they contained coarse and fine coal. Some had more fine coal than others—very much more” (p. 1009).

According to Enlow, on the afternoon of December 17,

“When they took the weight the tubs were well filled, and we saw but little lump coal in them; but when they were not weighed we saw quite a number go up that were not well filled,—a number of times, for instance, you might take a two-bushel sack or coal and empty it in the tub without making it any fuller than when they were weighed. Occasionally, therefore, there might be a difference of a sack of coal between the tubs that were and were not weighed respectively” (pp. 1048-9).

Describing his observations at night, on the occasion referred to, he said:

“I could, from the position occupied by me on the bridge, see the contents of the tubs of coal. I noticed that when they were weighed they were well filled, and when they were not weighed there were many of them that were like in the daytime, only worse. We looked down on the tubs from where we were, and we could see down at least six or eight inches along the side of the tubs. A sack or two of coal could be poured in some of them without running over” (p. 1050).

Edward Powers, on account of the various positions of authority occupied by him while employed by the Western Fuel Company, was one of the Government's most important witnesses. As we before observed, his desire to shield the defendants crops out at every angle of his testimony, until stirred into activity upon cross-examination. To properly present the material features of this witness' testimony upon the particular subject under discussion, in view of his manifested attitude of friendliness to the defendants, at the risk of being tiresome, we believe it essential to quote liberally from the record.

Upon being questioned as to the extent to which tubs were filled when weighed, the witness testified:

“Q. To what extent, if I may use the expression, were these tubs filled during that period of time when they were put upon the scales to be weighed?

A. They were filled.

Q. You say they were filled; to what extent were they filled?

A. That is the only way I can explain it, they were filled.

Q. There might be two ways of filling a tub. Is it not a fact, Mr. Powers—well, I will withdraw that. Just go on and state how they were filled, to what extent they were filled, whether they were filled by being just level with the top or whether they were filled to overflowing?

A. Sometimes they were filled to overflowing.

Q. During the time that you were hatch-tender there, Mr. Powers, what, if anything, did you see done with the tubs which were contained in the hold of these barges with reference to putting more coal in the tubs after the tubs were originally filled and before they were weighed?

A. Sometimes they would put more in when they were weighed.

Q. Is it not a fact, Mr. Powers, that that was a frequent occurrence?

A. It was.

Q. During that same period of time to what extent were the tubs ordinarily filled with coal which in fact were not weighed?

A. They were pretty well filled.

Q. You say they were pretty well filled; what do you mean by saying they were pretty well filled?

A. There was not much difference between them and the tubs that were weighed.

Q. You say there was not much difference; what difference was there?

A. There might be a few shovelfuls difference.

Q. Did you ever notice any difference between these tubs more than a few shovels full?

A. Yes, sir, I did.

Q. Upon how many occasions did you notice that?

A. When the customs man made me take it off the top, made me scrape the top off.

Q. How frequently did that occur?

A. Several times" (pp. 861-2).

* * * * *

"Q. That is not the question I asked of you. You have testified that the tubs that were weighed were well filled; is it not true that you have frequently during that time that you were hatch-tender seen buckets that were weighed filled to their uttermost and buckets that were not weighed filled to such an extent only that the coal sometimes would not reach the tops of the tubs; is not that true?

A. Once in a great while, yes, sir.

Q. Did not that frequently occur?

A. No, not so that you could not see the top. They were always pretty well filled" (p. 863).

And later:

"Q. How frequently did you see these men put more coal into the buckets that were about to be weighed when weights would be called for?

A. I have seen them do it.

Q. Is it not the fact, Mr. Powers, that you have seen them do it frequently during the time you were hatch-tender.

A. I have seen them do it quite often.

Q. You have testified, Mr. Powers, that weights would sometimes not be taken for 3 or 4 hours, upon one of these barges; is that true?

A. That is true.

Q. Is it not a fact that in those instances, or rather, in a great many of those instances, the tubs which were not weighed did not contain as much coal as the tubs which were weighed?

A. That is true" (p. 864).

Edward Powers manifested the same reluctance in disclosing the cause of the overage. After evading the question, he finally said:

“Q. Have you any idea at all upon the subject?

A. Very little.

Q. Well, very little; however small or infinitesimal that knowledge may be, Mr. Powers, we would like to have the benefit of it. What is your knowledge upon that subject, however small it may be?

A. The only information I have is they were loaded with so much coal and they overrun, that is all” (p. 880).

And after stating that Spring Valley moisture out of a hose helped a little, he finally said:

“I also thought that the method of weighing, that is to say, the custom of having some tubs go on the scales a little heavier than others, might be responsible for the overage. It is true that the overage, or a large part of it, was due to the fact that there was more coal in the tubs which were weighed than there was in the tubs which in fact were not weighed” pp. 881-2).

That the complaints of the engineers regarding shortages were not groundless, is also shown.

“Q. Now I will ask you why, in your judgment, or rather, why did you believe or did you think or conclude that there was justification for those complaints?

A. The fact that the barges overrun; they show in the book they overrun.

Q. And that indicated to your mind what?

A. Well, they were getting less coal than was charged to them” (p. 886).

The reason for the form of the question first put to the witness is shown by what precedes the evidence quoted, and is but another indication of his desire to withhold hurtful evidence against defendants.

It is quite evident that statements made by Mills that he did not want to have any trouble over there, referring to trouble with the weighers, and his statements to the hatch-tenders to keep the tubs filled, were only made in the presence of a Government weigher who was conscientiously discharging his duty, and then only for his benefit. This was shown upon cross-examination of the witness, Edward Powers:

“Q. Is it not a fact, Mr. Powers, that Mr. Mills used to say, whenever any of these matters would come up, or complaints come up, that he did not want any trouble over there, or not to have any trouble over there?

A. He would say not to have any trouble over there—yes, he said that.

Q. And is it not a fact that you heard him say to the hatch-tenders and to yourself to keep the tubs even?

A. Yes, sir, when the custom-house weighers were standing there, yes, sir.

Q. You do recall him saying that in the presence of the custom-house weighers, do you not?

A. I do” (p. 908).

That the overfilling of tubs that were weighed was due to wrongful practices was positively testified to by the witness on cross-examination.

“Q. Now, then, do you mean to be understood as testifying to this Court and jury that

there was any wrongful action on the part of those stevedores in the filling of those buckets or in the loading of those buckets that were hoisted during the discharge of those barges?

A. I do.

Q. And what is it?

A. Well, for the reason the report was rendered F. C. Mills and J. B. Smith every day stating that the barges had overrun, sometimes as high as 10, 20 and 30 and as high as 35 per cent, over what was loaded into the barges; therefore it showed conclusively that it was fraudulent, didn't it?

Q. I am questioning you, Mr. Witness. I am asking you what you saw there. Did you see anything down there, either during the time that you were acting as hatch-tender yourself or afterwards during the time that you were acting as assistant to the superintendent, leaving aside the Mills' books—perhaps they will be come to later—and confining you now to what you saw down there, what you observed, what did you see down there that you claim was wrongful action on the part of those stevedores?

A. I have already testified to the tubs, when they were weighed they were overloaded.

Q. Did you see them doing that?

A. Well, I seen them when I was standing on the deck of the barge, and the tubs was going up, and when they were in the process of being dumped, and there was not as much put in them as when they were put on the scales. And Mr. F. C. Mills standing on the deck saw it with me.

Q. Do you claim that they were overloaded intentionally and deliberately, by those stevedores?

A. In some cases, yes.

Q. Was that true, Mr. Powers, while you were acting as hatch-tender there?

A. It was.

Q. And how many cases did you observe of that kind during the time that you were employed as a hatch-tender for this company?

A. Numerous times.

Q. Numerous times. Did you ever tell the stevedores to do that?

A. I told them to fill the tubs up, to keep them well filled.

Q. You told them to fill the tubs up and keep them well filled, did you not?

A. I did.

Q. You have told them that time and time again, have you not?

A. I told them quite often.

Q. And hasn't Mr. Mills told you to tell these stevedores to fill the tubs up and to keep them filled up, and well filled?

A. Mr. Mills has not told me to fill the tubs up and keep them well filled. On the transport dock, Mr. Mills told me to underload the tubs—on the transport dock, not on the Pacific Mail Dock.

Q. Well, did you tell the stevedores, then, of your own volition, and without suggestion from him, to keep the tubs filled, and to keep them well filled?

A. I told them to put coal in the tubs when they went on the scales, plenty of coal" (pp. 924-6).

This witness also testified that under instructions of Mr. Mills, he told the hatch-tenders, "These barges are running a little short, don't let that occur again"; and that the statements made by him to the hatch-tender to keep the tubs filled were made upon occasions when a Government weigher was complaining about unweighed tubs, and would only be made in the presence of the weigher (pp. 929-930).

That these statements were only made for the benefit of the weigher, is likewise shown by the testimony:

“Q. Did it not come into your mind, then, Mr. Powers, when you were asked about keeping the tubs even, which you yourself know means keeping them filled on the scales and off the scales while they are going up there on the side of the vessel, that you had stated to the hatch-tender to fill the tubs and to keep them well filled?

A. I told him in the presence of the weigher to fill the tubs, yes, sir.

Q. And did you tell him in the presence of the weigher to keep them well filled?

A. I may have.

Q. You say you may have?

A. Yes.

Q. If you did tell him that, to fill the tubs and to keep them well filled, it meant, so far as the meaning of the words themselves were concerned, at least, that the tubs should be kept even, did it not?

A. *It was said for effect on the weigher to satisfy him*” (p. 934).

While under cross-examination, he was questioned concerning the statements made by him to the attorneys representing the defendants, upon his visit to their office at the request of Norcross. While he admits stating that the system was partially responsible for the overages, he said:

“I told you that when they went on the scales they were overloaded and when they went up without being weighed they were underloaded” (pp. 939-40).

And again:

“Q. Does it come back into your mind clearly and distinctly that in speaking about that system of weighing, that there was a partial responsibility for the overage, and that you used the word ‘part’ or ‘partial’?”

A. Yes, sir, it does.

Q. Are you able to testify now, with the recollection that has just come to you, positively and unequivocally that that word ‘part’ or ‘partial’ or some word of similar meaning or import was in fact used by you?

A. I am pretty sure it was, otherwise I would be very foolish to give the statement to you that 35 per cent overage was on account of that.

Q. Did you make that statement to me, too?

A. No, I did not make that statement then, I am making the statement now that that percentage would be a very foolish statement to make” (p. 944).

That the witness’ testimony was unquestionably true was demonstrated by a question put to him by Mr. Olney, as follows:

“Q. I will repeat the conversation to you, and then I want an answer, yes or no, from you in regard to it: If I did not open the conversation by saying to you, ‘Mr. Powers, we want to know what the truth is about this matter, is there anything wrong or was there anything wrong down there in connection with the loading of the vessels, or anything you know about down there on the waterfront,’—and did you not say, ‘Yes, there is something wrong’; and did we not then ask you what was it which was wrong, and did you not then reply to us *that the thing which was wrong was that the buckets were heavier loaded when*

they were weighed than when they were not weighed?

A. I stated that that was partly responsible" (pp. 950-1).

That in "meeting the hook" when weights were not being taken, the men were not continuously employed and if desired, could have placed more coal in the tubs, is also shown. Says this witness:

"If these buckets are being hoisted at say 30 an hour, that would be about 2 minutes to each bucket, the men would have practically eight minutes within which to load and bring the bucket of coal forward to the hatchway. It frequently occurs, then, that the two men engaged in loading each tub or bucket complete the labor of loading that tub before it is necessary for them to meet the hook; and it also often occurs that these two men complete their labor, so far as the loading of a particular tub or bucket is concerned, before they are called upon to meet the hook upon occasions other than those upon which the tubs are being weighed" (p. 974).

Robert Sass who, upon occasions, acted as engineer, hatch-tender and shoveler upon the barge, and who, therefore, was in a position to know positively what would occur in the discharge of coal, testified:

"When I worked for the Fuel Company prior to 1904 I observed the way the buckets were being filled from time to time on the barges when coal was being discharged from barges into liners. The tubs that were weighed were always loaded up, filled up, and those that were not weighed were very slight, the majority of them. The coal placed in the tubs that were weighed, as compared with those that were not weighed, was almost always fine or slack coal,

with no lumps in it. The fine coal is heavier than the lump coal. When I was an engineer hoisting on the barges from 1909 to 1910, I again observed the same thing in respect to the tubs."

* * * * *

"Sometimes the tubs that were not weighed would contain as much coal as when weighed on the barges, but not very often" (pp. 1098-9).

Upon cross-examination, the same subject was alluded to.

"Ever since I can remember the buckets were full when they were weighed, and light when they were not weighed. * * * I have seen lump coal in those buckets that would be weighed, but the majority of the coal was fine coal when weights were taken. In other words, when they would weigh the tubs they would generally put in fine coal, and when they would not weigh the tubs, they generally put in fine and lumps mixed" (pp. 1100-1).

Philip Ganesi, also a shoveler on a barge, gave similar evidence, he stating:

"During those four years of my employment, they would always, when weights would be taken, put fine coal in the tubs. It weighs more. The tubs would be often all full of fine coal, the heaviest coal you can find on the barge. So far as the tubs that were not weighed were concerned, they would put in anything that would go, awfully fine or anything. The hatch-tender, above five minutes before a weight was to be taken, would holler, and then we would be keeping watch when the custom-house man came, and we would fill the tub. One time the hatch-tender told me that my tub was pretty light when a weight was to be taken, that there was not enough fine coal put in the tubs and

not enough coal put in and he said to me, 'Why don't you fill them up like the rest'? Four tubs are ordinarily weighed, one at a time, and my tub was the lightest of the four. It was all full of rough coal, rock, and he told me if I did that again he would fire me. The hatch-tender would be all the time telling the men to put more coal in the tubs that would be weighed, or to fill them with fine coal. * * * During my last period of employment, from 1911 to 1913, Mr. Rooker was hatch-tender. Rooker said every time, 'You fill them up pretty good when they are going on the scales, and when they are not going on the scale he don't care'; and the men did fill the tubs well when they were being weighed. The tubs that were being weighed contained more coal than those that were not weighed" (pp. 1106-7-8).

When discharging imported coal overside, the practice would be reversed, that is, the tubs that were weighed would be underfilled, while those that were not weighed would be overfilled. As to this, the same witness testified:

"During these four years, also, I sometimes worked in the hold of a ship that was discharging imported coal, and upon those occasions the coal would sometimes be weighed upon the decks of the ship. They would tell me then, 'Don't you fill too much when they are going on the scales, otherwise the Western Fuel people will get mad if you fill them up too much.' That was in connection with the imported coal" (p. 1107).

Jim Balestra, now a landscape gardener, but who had been both an engineer and shoveler upon the barges, and who had worked under Dave Powers

and Dan Pallas, as hatch-tenders, gave his version of what he observed in the following language:

“As to the method in which we shovelers in the holds of the barges handled the tubs which were weighed and which were not weighed, I would say: When it was time for the United States Government to take the weights we would go to work and put on as much coal as we could possibly put on all of the tubs; and when we did not have to take the weights we would put it on ‘any old way’, we would always leave the tubs not quite full. I never got any direct order to overload tubs from anybody, with the exception of one hatch-tender by the name of Rooker, who would give us a wink at the time when it was time for the custom officer to take a weight, and we knew the balance. Most of the time the custom-house officers used to complain that the tubs were overloaded when weights were to be taken. Some of them, however, did not complain. When a custom-house officer would complain, we, as a rule, would have to take some of the coal off the tub. The way in which we knew that a weight was to be taken was,—the weigher would be standing on one end of the barge, and the hatch would be in the center of the barge, so that when the hatch-tender saw the officer coming he would give us the wink. He did not know positively that a weight would be taken, but he would give us the wink anyway. Sometimes he would say, ‘They are going to take a weight.’ On the ‘Theobold’, the ‘Melrose’ and the ‘Wellington’ the hatch-tender always called up a couple of men to help swing the tub over on the scales. When weights were to be taken we, of course, put fine coal into the tubs if we had any show at all. The reason we did that was because it weighed more. In answer to the question whether anything was said by the hatch-tender or by anybody else upon the subject of putting

more coal into the tubs and of putting fine coal into the tubs when weights were to be taken if we had a chance to do that, I would repeat what I have already said, that we would get a wink from the hatch-tender that they were going to take a weight, and that we knew the balance" (pp. 1119-20).

This witness also testified that when weighing tubs upon the "hanging scales" it frequently occurred that the shovelers would put their foot upon the tail of the tub so as to make the tub weigh heavy.

"The part of the scales indicating the weight would be above the deck. On such occasions we would often step on the rope or tails of the tub if we had a chance to do so, and thereby press on the scales, and consequently make the scales register more weight than they should. We could not do that very often if the custom-house officer were on the lookout, but we did it whenever we had a show" (p. 1120).

That the reverse method was pursued in discharging foreign coal overside, was also testified to (pp. 1121-2).

That the signal from the hatch-tender would be given in advance and sometimes caused them to over-fill tubs that were not weighed, was shown upon the cross-examination of this witness.

"Q. Oh, this wink that you speak of was given a round or two ahead; is that correct?

A. At times, not always.

Q. Not always?

A. No.

Q. When the wink was given to you, when did you understand the weighing was to take place, the next round, or the second round or the third round?

A. Then we would be good and careful to overload every time so that when they did take the weight they would be on the safe side.

Q. Oh, after you got the wink you loaded the tubs to overflowing every time so as to be sure not to get caught; was that it?

A. Exactly" (p. 1132).

Tony Belish, also a shoveler, thus described the practice complained of:

"When the tubs were going on the scales, the practice of the shovelers was to get heavy coal from amidships, if they had the chance and there was no custom-officer around. By amidships coal I mean fine coal. In the wing the coal is rough and light. I would know when a weight was going to be taken because the hatch-tender would holler, 'Give me a tub on the scales.' * * * After the men came up on the deck the shovelers in the hold would stand there and fill up the tubs. They would fill them up good, you know, load them. They would put a little more coal in the tubs when they go on the scales. I have done that myself. The hatch-tender gave me a sign to that effect. He would say, 'This fellow is going on the scale', and would make a sign which everybody knows who has worked down there five or six years. There would be about 100 pounds difference in the tubs which were weighed and those which were not weighed" (p. 1137).

This testimony was amplified upon cross-examination, where the witness testified:

"I have said the difference between the weight of the tubs that were weighed and those that were not weighed on the barges was 100 pounds. I know, because I was on the deck and put the tubs on the scales, and when they had rough coal it weighed about 1800 or 1900

pounds, and when they had fine coal it weighed about 2100 or 2150 pounds.

Q. But when the tubs were to be weighed and it was known they were to be weighed, they were always filled with fine coal, which you say was the heaviest coal?

A. Yes, fine coal is heavy coal.

Q. And those tubs which were to be weighed did not have any lump coal in them at all?

A. Sure, they get some lumps, but they get between the lumps, fine stuff, pretty fine stuff, and pretty much of the fine stuff.

Q. When you say there was no custom-officer around, you got the heavy coal?

A. Sure" (p. 1139).

Upon three or four occasions between 1906 and 1909 J. T. F. Burns, while temporarily relieving an assistant weigher, observed that the buckets that were weighed were fuller than those that were not weighed, and noticed that after a signal would be blown in a certain way, it would be followed by a bucket that would be loaded heavier than any of the others (p. 1155). During this same period of time and until October 1, 1910, upon a number of occasions he would be upon the decks of the liners for fifteen or twenty minutes at a time. In describing what he noticed regarding the condition of the tubs, he stated:

"My observation of the weighing was that they would take along about every fourteenth or fifteenth tub, and when they came up out of the hold of the barge, the coal would be all falling off of it, and the other times you could not see where the coal was in the bucket; once in a while you could see a big lump sticking out of the tub, and none on the side. I noticed on

one occasion, I saw a weigher having trouble with the men shoveling coal into the tubs, and he weighed ten tubs. After he took the first three weights, I noticed that the other seven buckets were fuller than the first three tubs.

Q. To what extent?

A. To the extent that they came up out of the hold with the coal falling off of them."

* * * * *

"Q. Upon those occasions, ordinarily, and without referring to any specific occasions, what did you observe regarding the quantity of coal that would be contained in the tubs that were weighed?

A. Well, the exact weight, I could not tell.

Q. I do not mean so far as the pounds or tons are concerned, but I mean as to what you observed regarding the quantity of coal in the tubs, how was the coal located upon the tubs?

A. Well, it always, at any rate it rather looked heaped up on the center, and that is the reason I always had the idea it rolled off the center of the tub.

Q. What would you ordinarily observe regarding the quantity of coal contained in these tubs which were not weighed?

A. Well, sometimes you could see the coal in the tub, and sometimes you could not" (pp. 1156-1158).

A. H. Freund, formerly an assistant weigher, voiced his experience upon this subject in the following manner:

"I have frequently weighed draw-back coal. I think it was from 1904 or 1905 until the time when they took off the duty. Such coal would be weighed from the barges. I have worked often on the barges in the daytime and sometimes at night time.

* * * * *

Q. I want you to go on and state to the jury what you have observed from time to time while you have acted as assistant weigher upon those barges weighing draw-back coal, so far as the filling of the tubs is concerned.

A. Well, I can state that it has been the usual thing to always have trouble; the coal shovelers if they knew you were going to weigh would load the coal up to the hatch, right up as high as they could on the tubs; I would holler down the hatch to Mr. Parks—he was always clerking as a rule with us—he would kick about it and then I would go over the hatch and tell them that if they didn't quit it we would make them. I have also spoke to the hatch-tender and he has told them also. I have had tubs come up that were loaded so that when they came out of the hatch, or when I came to the hatch—we had orders not to stand over the hatch; our orders from the chief weigher were to stand clear of the hatch and take the tubs at random, but when they knew I would weigh I have seen them throw on 3 or 4 or 5 shovels of coal to fill it up and I would let it go by, I would not weigh it" (pp. 1176-1177).

* * * * *

Q. Upon occasions when you would notify the hatch-tender that you wanted to weigh a round of tubs and a round of tubs would be weighed by you, what, if anything, did you observe the shovelers down in the hold of the barge doing with reference to the quantity of coal which would be contained in the tubs which you would be called upon to weigh?

A. Well, on a few occasions I have caught them heaping the tubs and I would refuse to weigh them. As a rule I have called them down pretty hard and threatened them that I would ring up Mr. Mills or somebody and get a gang of men who would do as they were told; as a rule they gave me pretty good weight.

Q. Did you ever compel them to remove coal from the tubs?

A. Yes, sir" (pp. 1180-1181).

This witness also stated that it frequently occurred that when he came to weigh tubs he found that they contained so much coal that he refused to weigh them, and would let them go up to be dumped without weighing (pp. 1181-1182). It also appears that upon one occasion he weighed a barge short. As the result of this situation, he failed to get another assignment on the Mail dock for some months (pp. 1182-1183).

MILLS KNEW AND ACQUIESCED IN PRACTICE.

That this practice was not only known to Mills, but its continuance was insisted upon and encouraged by him, is likewise made manifest. Says the witness Edward Powers:

"When I spoke to defendant Mills about the matter (talking about complaints of shortages from engineers), he would tell me that the United States custom men were weighing the coal. He gave me the same excuse that I was giving the other men, and it was a true excuse. The custom weighers were weighing the coal. In answer to the question whether the defendant Mills ever suggested to me the propriety of telling the men in the hold that they ought not to put any more coal in the tubs that were weighed than in the tubs that were not weighed, I would say that Mr. Mills told me that the chief engineers were always growling,—that it was part of their job to growl. He asked me if I had any trouble with the weighers, and I said no, that they were weighing the coal, and

that they were not kicking. Mr. Mills told me not to have any trouble over there. I have no distinct recollection of his telling me to suggest to the men in the hold that they should not put any more coal into the tubs that were weighed than in the tubs that were not weighed, but he may have told me that—I don't remember, that is a long time ago; he may have told me that, I have forgotten" (p. 870).

It appears that upon some few occasions the barges ran short, about one per cent of the barge discharges. That these shortages did not meet with Mills' approval, is also shown by the evidence of this witness. Upon this subject he testified:

"Q. Did the defendant Mills ever discuss with you the cause for the difference in weights that were checked in as compared with the weights that were checked out?

A. He did not.

Q. He did not?

A. No, except when he ran short he made a howl, that is all.

Q. How frequently, how often did the barge run short?

A. Two or three times, to my knowledge, a couple of times—two or three times."

* * * * *

"Q. Did he make any complaint about it running short?

A. I don't remember whether he did or not.

Q. What do you mean by 'howl'?

A. Well, 'The barge is running short; what is the matter.' That is all."

* * * * *

"Q. Are you prepared, are you in a position to testify distinctly or clearly that he did not say anything else?

A. No, I am not; I don't remember" (pp. 874-5-6).

The evidence quoted was given upon direct examination. The equivocal answers made by the witness, and the necessity for further questioning to develop the facts within his knowledge, clearly manifest the antipathy of the witness to the Government, and his friendly mental attitude towards defendants.

The desire of Mills not to have trouble with the weighers was not an insistence on his part that the tubs be kept filled. It was his purpose, so far as possible, without deviating from the method thoroughly understood by the men, to avoid undue friction with the Government weighers who might insist on the proper weighing of the coal.

It seems that upon a number of occasions, complaints were made by assistant weighers against the practice indulged in, of overloading tubs that were weighed, and underloading tubs that were not weighed. In fact, upon a number of occasions, the situation became so acute that coal had to be taken out of the tubs before some of the weighers would permit them to go on the scales.

Many of these complaints were directed against particular hatch-tenders, and were repeatedly made (pp. 909-910). If the Western Fuel Company, or if Mills had been either anxious or desirous to terminate this practice, but little difficulty would have been encountered by it, or him. A command from the defendant Mills, or the defendant Smith, that the tubs be kept even, and that unless kept even, or if complaints of the character mentioned

were again made, the hatch-tender would be discharged, would have been immediately effective. To accomplish such purpose, however, was not the desire or intention of either Mills or Smith. This is conclusively shown by the evidence of Edward Powers (pp. 908; 910). All that Mr. Mills could be persuaded to say was not to have trouble with the customs weighers.

“Q. When he would talk to you about not having any trouble over there, referring to trouble on the mail dock, was he not talking about the keeping of the tubs even, if that is the expression that is used?

A. Well, a complaint came in about one of the hatch-tenders. That is the reason it was said.

Q. A complaint came in about one of the hatch-tenders?

A. Overloading the tubs, yes, sir.

Q. Do you recall from whom that complaint came in?

A. It came to me from several customs weighers.

Q. It came to you from several customs weighers?

A. At several different times.

Q. And you reported that complaint to Mr. Mills, did you not?

A. I did.

Q. And it was in connection with that, that Mr. Mills stated to you that he did not want to have any trouble over there, was it not?

A. It was” (pp. 908-9).

Powers, following the trail blazed out by Mills, would make the same character of statements to hatch-tenders, notwithstanding repeated complaints, for instance:

“Q. Do you remember at this time the name of the hatch-tender about whom the customs-house weighers had complained to you?

A. Yes, Dan Pallas.

Q. He was one of the hatch-tenders that was working for the company at that time?

A. He was.

Q. And what, if anything, did you say to the customs weighers at the time that they complained to you about Pallas?

A. Oh, I passed it off. I didn't say much to him.

Q. Did you have any conversation with Pallas?

A. Well, I told Pallas not to have any trouble with the weighers.

Q. *Did you not tell Pallas, Mr. Powers, to try to keep the tubs even?*

A. *The remark I made to Pallas was to have no trouble with the customs weighers*” (pp. 909-911).

And, although subsequent complaints continued to be made against Pallas (pp. 910-11), his retention by the company is convincing proof that he was considered an efficient and capable employee, watchful of its interests.

STEAMSHIP “ALGOA”.

At pages 94-95 of this brief we have pointed out how upon the discharge into barges of the cargo stored in the steamship “Algoa,” without considering the coal placed in her bunkers it weighed 116 tons 784 lbs. in excess of the customs-house weight at the time it was discharged from the importing steamer and loaded into the “Algoa.”

Upon being discharged from the "Algoa" the coal was checked into barges, which from time to time received coal from other sources, and with this additional coal subsequently found its way to the bunkers of vessels. All these barges, with the exception of one, turned out over. The exception resulted in a shortage of 34 lbs. (a fraction of a sack of coal). The total overages of these barges amounted to 351 tons 2006 lbs.

A table covering all of these transactions will be found at pages 1211-1215 of the record.

The operations resulting in the discharge of the coal from the "Algoa" were supervised by Edward Powers, and according to his testimony the coal was correctly weighed (p. 893).

**DEFENDANTS' FAILURE TO PRODUCE WITNESSES HAVING
KNOWLEDGE OF FACTS.**

It is a familiar rule of evidence that testimony is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and that therefore, if weaker and less satisfactory evidence is offered when it appears that the party had the ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

C. C. P., Sec. 2061, Subdivisions 6 and 7.

This rule has become so thoroughly established that it is part of the statutory law of almost all of

the states whose laws have become codified. That it is a most salutary rule and one grounded in common sense and based upon human experience, must be conceded; that it has application to the case in hand is unquestioned.

It appears without conflict in the evidence that for long periods of time the Western Fuel Company had many men employed upon its barges and in the holds of the discharging vessels, consisting of shovelers, engineers, hatch-tenders and barge-tenders. If, as claimed by the Government, tubs were wrongfully overloaded when weighed and underfilled when not weighed, such practices were known, not alone to the hatch-tenders, but likewise to the shovelers, the engineers and the barge-tenders. These men, above and beyond all others, were in a position to positively establish the truth or falsity of the charges laid in the indictment. Out of the hatch-tenders two alone were produced, Andrew Rocca and Frank Wilson. Dan Pallas, to whom trouble with the weighers had been imputed by direct evidence, although an employee of the Western Fuel Company, was not put upon the stand. Not a single shoveler, nor engineer, nor barge-tender was called upon to attest the innocence of the defendants. With the exception of the testimony of the defendant E. J. Smith, limited to a few details, no tally clerk, shipper's clerk or customs weigher was called to contradict the claims of the Government. Although cross-examined at great length and with an exaggeration of detail,

not a single witness attempted to impeach or contradict the testimony of Tidwell. Not a solitary engineer on any of the vessels coaled by the Western Fuel Company was sworn to corroborate the claims of the defendants that the weight of the coal discharged into the bunkers of these vessels was consistent with the weights entered in Mills' books, charged against the various companies, and upon which weights payment was received.

Many, if not all, of these witnesses were available. None were produced. No showing was made that they could not be produced. Why they were not forthcoming, and why the defendants were content to rest their case without the benefit of their evidence, is obvious. The inquiry answers itself. The rule invoked would condemn, at least as suspicious and distrustful, the weaker evidence offered.

The applicability of this principle of jurisprudence is emphasized when we take into consideration the fact that much wealth must have been distributed in procuring the attendance from distant climes of many high-priced experts to deliver eloquent dissertations on the many abilities of the coal to increase in weight—evidence that not only lacked merit, but in many of its details was flatly contradicted and disproved—while almost at the threshold of the courtroom were located witnesses who, if the defense were founded upon truth, could have attested its verity and persuaded a verdict of acquittal.

EXPERT EVIDENCE.

We might appropriately apologize for alluding, even in a limited degree, to the testimony given by the experts called on behalf of the defendants. We preface our remarks upon this subject with this statement because we realize that, however effective expert evidence may be, it is not binding or conclusive in any case. It can not weigh with the jury as against direct and positive evidence showing the facts to be otherwise than as the experts believe they should be. In fact, the jury with propriety and acting within their province, may disregard the expert evidence, even where it is uncontradicted, and base their verdict upon their own judgment. However persuasive this character of evidence may appear, even in a case unlike the one at bar, where the facts against which the expert evidence is leveled have been established by direct and positive proof, it is without force in an appellate tribunal, searching the record to ascertain whether the evidence introduced in the court below is sufficient to sustain the jury's verdict. Counsel for plaintiffs in error recognized the futility of discussing at length this phase of the defense. They referred to it, however, in support of some of their conclusions. It is for this reason that in the full performance of our duty to the Government we feel justified in briefly touching upon it, because in no aspect of the case, even if believed, does it meet the situation disclosed by the Government's testimony. In addition to this, however, Professor

Branner, president of the Stanford University and a well-recognized authority on coal, also called by the defendants, absolutely devitalizes the evidence given by the other experts. But, above and beyond all of this, the effect of this expert evidence was swept away by the testimony of Brown, in charge of the United States coaling station in California, whose actual experience established lack of foundation in their claim.

According to the experts, there are two main causes for changes in the weight of coal, one being moisture content and the other oxidation (p. 1574). Some coals are known as high moisture coals, that is, coals naturally containing considerable moisture. The Wellington, British Columbia and Australian coals, however, are all bituminous coals, of the low moisture class, having a moisture content at the time they are broken from the seam in the mine, of 3 or $3\frac{1}{2}\%$ (pp. 1602-3). Oxidation is due to the oxygen of the air and the moisture combined, coming in contact with the carbonaceous matter and the sulphur in the coal (p. 1612). This oxidation, according to the testimony of some of the experts, proportionately increases the weight of the coal.

According to the witness Parr, the coal handled by the Western Fuel Company between 1906 and 1912 by reason of added moisture and oxidation might increase in weight between 2 and 4 or $4\frac{1}{2}\%$ (pp. 1622-3). To this he subsequently adds $1\frac{1}{2}\%$ for water placed on the coal to lay the dust, thereby increasing this general percentage from $3\frac{1}{2}\%$ for the

minimum to $5\frac{1}{2}\%$ or 6% as a maximum, so far as the barges are concerned (p. 1625). This is finally reduced again by him from $2\frac{1}{2}$ to $4\frac{1}{2}$ or 5% . (p. 1626).

The cross-examination of Parr completely destroyed the effect of his testimony on direct. After testifying that within fifteen days, in the climate of San Francisco, by oxidation alone coal might increase in weight $\frac{1}{2}$ of 1% (p. 1662), and later as much as $1\frac{1}{2}\%$ (pp. 1622-3), he then gives the same figures for a period of sixty days (p. 1666). He admits that it would be impossible to ascribe any natural or scientific cause to the increase shown by some of the barge overages (pp. 1669-70). He then states that although heat increases oxidation and makes its progress more rapid, a cargo in transit from Australia to California would not gain or increase in weight, because the loss of moisture would offset the oxidation (pp. 1672-3). Admitting that there would be very little evaporation on the trip from Nanaimo to San Francisco with the hatches closed, he nevertheless would not state that there would be an increase of weight due to oxidation (p. 1674), but believed that it might be possible (pp. 1677-8). He was finally persuaded to testify that in any event the loss in weight of a cargo in transit between Nanaimo and San Francisco would not be more than $\frac{1}{4}$ of 1% (p. 1681).

And although the witness understood that he had been employed to testify to an increase in the weight of coal during a given period, he failed to make any

report to the defendants on the result of oxidation (pp. 1694-5). Notwithstanding all of this evidence thus given by him, including the increase in weight through the handling of coal by the Western Fuel Company, and the experiments conducted by him, and the alleged increase in weight due to oxidation and moisture content, a bulletin written and published by him in his professional capacity for scientific purposes and for the instruction of students (pp. 1702; 1729-32), entitled "Weathering of Coal," was called to his attention.

Among other things, this bulletin set forth experiments conducted by Parr by leaving coal in an open box on a roof in Illinois from December 15, 1908 until June 17, 1909, exposed to rain, snow and storms resulting in each instance in a *decrease* and *loss* of weight (pp. 1699-1704). In another case cited by the witness in his bulletin, in 124 days, instead of there being an increase in weight resulting from oxidation, there was a decrease of 0.33 of 1% (p. 1718).

Relating to the tables above cited, the witness testified:

"Q. Were not the opportunities for oxidation in this given case appearing on page 3 greater than the opportunities for oxidation of the coal in the bunkers of the Western Fuel Company?

A. I cannot say as to that" (p. 1723).

In another part of the same bulletin the witness cited the case of W. A. Powers, chief chemist of the Santa Fe Railway Company, who made tests

exposing 100 lb. lots of coal to the elements for seven months, showing in each instance loss of weight (pp. 1728-1730).

On redirect examination the witness attempted to give some explanation of the tables above referred to, but this explanation was again shattered upon recross, when the witness testified:

“Q. What does this 1.54 mean? Will you explain it, please—minus 1.54?

A. It means that there was a seeming decrease in the mass of coal.

Q. A seeming decrease in the mass of coal which was free from moisture?

A. Which was free from moisture.

Q. Which was free from moisture when it was first weighed, and which was free from moisture when it was last weighed?

A. That is true.

Q. Now, during that period of 6 months, did the coal oxidize?

A. It did.

Q. Notwithstanding the oxidation, there is a seeming decrease in the weight of the coal, equivalent to 1.54 per cent?

A. There is.

Q. After all the moisture had been deducted?

A. There is” (pp. 1767-8).

The testimony of Prof. E. E. Somermeier, another expert called by the defendants, although possessing some similarity to the evidence of the preceding witness, was not as strong or as vigorous. In his judgment the coal in transit from Nanaimo to San Francisco might diminish, but if so, to a very slight extent (p. 1785). According to this witness,

oxidation did not take place as rapidly as indicated by Prof. Parr, he stating that Australian coal remaining in pile for *two months* might oxidize perhaps $\frac{1}{2}$ of 1% (pp. 1793-4). The judgment of this witness was that the increase in weight in the coal handled by the Western Fuel Company between 1906 and 1912 would be from 2 to 4% from natural causes, with possibly $1\frac{1}{2}\%$ added if the barges were wet down for six months of each year when no rain fell (p. 1798).

Notwithstanding the giving of this evidence, it appeared on the cross-examination of this witness: that while at Nanaimo he had taken a sample of coal from a car, the contents of which had been exposed for six weeks, and upon which a half inch of rain had fallen, and yet it had increased in weight only 19/100 of 1 per cent. That this situation was inconsistent with the testimony of the witness, is shown by his own inability to explain.

“Q. I will direct your attention to these figures here; you say that the sample taken from the mine showed a moisture content according to the Pittsburg method of 2.97; the sample taken from the open car showed a moisture content of 3.16, after six weeks' exposure on the car, a difference of .19 of one per cent. Now, there is a difference of .19 of one per cent between the moisture content of the coal taken from the mine and the moisture content of the coal taken from the open car which had been exposed to the rain and the elements for six weeks, and upon which $\frac{1}{2}$ an inch of rain fell; there is only a difference of .19 per cent. How do you explain that according to the theory you have announced here?

A. The sun was shining on the car most of the time during that six weeks.

Q. The same sun shines in San Francisco as shines up there, does it not?

A. Certainly.

Q. And the moisture permeates through the mass of coal according to the duration of exposure to the rain, does it not?

A. Certainly.

Q. And the moisture permeates through the mass of coal according to the duration of exposure to the rain, does it not?

A. It is according to the amount of rainfall, yes" (p. 1811).

This witness again contradicts Parr by stating that in his judgment coal contained in a shed for six weeks, having plenty of ventilation, might increase in weight from 3/10 to 5/10 per cent by oxidation (p. 1834).

A preliminary report made by this witness to defendants' counsel is strongly in discord with his testimony. It is there stated that, on the assumption that the coal is held in storage for an average period of three to four months, the amount of rainfall at San Francisco, 22 inches, is sufficient to increase the moisture in the coal 3 or 4%, the assumption being based upon the idea that the average storage period means that fifty to seventy-five thousand tons of coal were kept on hand (p. 1844). He further states that

"The oxidation of coal in the time held in storage here is probably less than three-tenths of a per cent, which would correspond to less than three-tenths per cent increase in weight due to this cause"(p. 1845).

The report on this subject then concludes:

“With this low moisture coal, and with the humidity and rainfall of San Francisco, the changes in weight are practically all increases. The increase due to rainfall may well be as high as three per cent, that due to oxidation of the coal itself up to three-tenths per cent, and that due to oxidation of sulphur to sulphate from three-tenths to one and two-tenths per cent, and that the total result is over three per cent is not at all surprising” (p. 1846).

David M. Folsom had been a professor of geology and mining at Stanford University for about three years. He testified to a number of tests and experiments conducted by him for the purpose of ascertaining increase in the weight of coal due to moisture and content and oxidation. He illustrated and elaborated his testimony with many picturesque charts, the value of which from an artistic standpoint cannot be minimized. In conducting the experiments he testified to soaking the coal, weighing it, and then soaking it again, and according to his evidence, each soaking added vigor to the theories which he was attempting to expound. When the direct examination closed, every one in the courtroom marveled at his learning and many were almost persuaded that his judgment was infallible. It was with considerable surprise that it was finally developed upon cross-examination that he was without experience in coal and that, while he felt that he was competent to make the tests that Mr. McCutchen wanted, when he came to see him he told him, using his language, that

“All I knew about coal was that it was black and that it would burn, under certain conditions” (p. 1906).

After this witness had left Stanford University he went to work in the copper mines in Montana, having had no experience in coal up to that time. While there, he was engaged at the smelter for five years and three months. Four hundred tons of coal a day were brought there for fuel purposes. They had kept four thousand tons in the yards in storage at a time. A tally was kept showing the amount of coal that went into these piles and the amount of coal that went out, and on the first of every month the witness had to estimate the amount of coal in the pile, for the purpose of striking a balance and checking the weights of the smelter foreman. Regardless of these facts, he found it impossible to testify whether a pile containing a given number of tons ever showed an increase in weight when it became exhausted (pp. 1901-2). After leaving that employment he took up teaching at Stanford, and admitted that he had never been in a coal mine and that his only experience in connection with the Montana company was in the matter of ordering supplies of coal and measuring the stock (p. 1902). As bearing upon his lack of experience, he testified:

“I have never made an analysis of coal for the purpose of determining the amount or increase in the weight of coal by reason of oxidation or for the purpose of determining the moisture content of the coal, or for ascertaining

the change in the weight of coal from any cause, —except, of course, in the tests that I have described here in court.

“I never in all my life previously made such analyses as those on the tables which have been shown here, which tend to show a certain reduction in the moisture content in coal, and a certain increase in weight by reason of the oxidation of the sulphur in coal and a certain increase in weight by reason of the oxidation of the substance of the coal” (pp. 1003-4).

It later developed that, with the exception of putting some letters on tables 1 and 3, he had had nothing at all to do with the making of the charts, testifying that if Mr. Pyle, by whom they were made, had not taken sick on the job, he personally would not have touched them (pp. 1905-6), and that, as a matter of fact, a Mr. Bohart had made the analyses and had looked after the actual work done on the tabulation relating to tests of oxygen (p. 1906).

The effect of the testimony of this witness and of his numerous charts was finally completely extinguished when, over the objection of the defendants, it was ascertained that between July 21 and August 21 he had experimented with different kinds of coal, by subjecting them to the atmospheric influences, showing in each instance an ultimate loss, instead of increase, in weight. His testimony upon this subject follows:

“Q. Did any rain fall during the time this coal was subjected to the atmospheric influences?

A. A little rainfall, .09 of an inch.

Q. What did you ascertain when you made that experiment, as to the loss or gain of that coal which you experimented with to show the result of the atmospheric conditions for one month?

A. I found that immediately after the rain, a day after the rainfall, the rain fell for two or three nights in small showers, between July 21 and the 25th; on the 26th of July, and on the 25th of July the coal showed a gain in weight, various samples, it ranged between .093 per cent gain up to .3 of a per cent gain. This coal was exposed until August 21st, and most of the samples had lost its moisture.

Q. Now, as a matter of fact, during this one month's exposure, and notwithstanding the downfall of rain, all of this coal diminished in weight, did it not, according to your own report?

A. Yes, sir; but that is not a fair test—
* * * because the wind was blowing quite strongly down there during the month of August, and it blew out a good deal of dust in the pans, and I didn't pay much attention to that test, except that it indicated that coal was susceptible to change in weight.

Q. Is it not the same kind of wind that blows down there that blows over the Folsom Street bunkers up here?

A. Yes, sir" (pp. 1911-1912).

COMPLETE COLLAPSE OF DEFENDANTS' THEORY.

In laying the foundation for expert evidence, D. C. Norcross, when called as a witness for the defendants, stated:

"The average amount of coal on hand and on storage during this period (April 1, 1906 to December 31, 1912) on the first day of each

month is 32,085 tons. The coal is stored partly in San Francisco and partly in Oakland. The Western Fuel Company has covered storage space affording protection from the rain for about 10,000 tons of coal, 6,000 in Oakland and 4,000 in the Folsom Street bunkers, but we only use about half the Oakland space for imported coal, and, for the last two years half of the Folsom Street space has had the roof off" (p. 1619).

He further testified that—

"The average amount of coal received per month would be very close to the scales, because there would only be a few thousand tons on hand at the end of the period, and it would average up about the same. The yard coal is apt to remain with us longer than the bunker coal. We always go to the bunkers first and leave the yard pile untouched except when the bunkers are exhausted.

We do keep coal in the yard for say more than 30 or 60 days at a time. How long we keep it depends as a matter of fact upon the amount of coal in the bunkers. The coal is moving in and out a good deal from the Oakland bunkers as also from the San Francisco bunkers. The coal is also continually moving out of the yard in San Francisco, but it moves more frequently when there is no coal in the bunkers. Large quantities of coal are constantly coming in and going out and that is particularly true with reference to the bunkers, which are merely temporary storehouses" (pp. 1619-1620).

It thus appears that the coal located in the bunkers, from which the barges take their cargoes, is kept moving practically all the time, and that the large majority of coal that is kept in storage is con-

tained in piles located in the yards of the Western Fuel Company, a department over which the defendant Mills had no jurisdiction and with which we are but indirectly concerned.

One of the leading experts called by defendants was Professor J. C. Branner, President of Stanford University, whose direct examination disclosed considerable knowledge of coal. His testimony effectually disposed of the oxidation theory as applied to the facts in this case, and proved that in the handling of the bunker coal, between the moment of its initial discharge at this port, and its delivery into the bunkers of the vessels, but little weight would be taken on as the result of increased moisture content. We quote his evidence:

“Q. Assume that a load of that coal comes here to San Francisco, in dry weather, and is exposed for, say, ten, twenty, or thirty days, in the absence of any rain, and assume that the moisture percentage varies from 2.53 to 4.44, would not that coal lose weight by reason of the exposure to the atmosphere?

A. I don't think so.

Q. In dry weather?

A. I don't think so. Excuse me, I mean if that moisture content that you refer to there is the moisture content as stated in an analysis, that moisture would not be lost.

Q. That moisture, itself, would not be lost?

A. No.

Q. But would the coal take on any additional moisture if it did not rain?

A. I should not think so.

Q. You should not think so?

A. No.

Q. You would think that in dry weather, in the absence of rain, the moisture content would not be altered at all?

A. I should not expect it to.

Q. Now assume a case of this kind, Doctor, a cargo of 3,000 or 4,000 tons of this coal is brought from Nanaimo to San Francisco, in dry weather, in the summer-time, when the ordinary summer winds prevail, and there is no rainfall, and assume that when the coal comes here it is discharged into bunkers of the dealer in coal, and is during the prevalence of dry weather, within a very few days, transferred from the bunkers into barges, and within a few days, say ten days, is transferred from barges into ships, for fuel purposes, no rain, mind you, in the meantime falling at all, in your opinion would that coal be affected in weight?

A. I should not think so.

Q. In other words, you would think that the coal, when placed in the ship from the barge, would be equivalent in weight to the weight of the coal when transferred from the mine into the ship.

A. I should think so" (pp. 1818-1820).

After testifying that if such a cargo of coal contained about 25 per cent of fines, (screenings) in the winter time, considering the weather in San Francisco, it would increase decidedly more than $\frac{1}{2}$ of 1 per cent, he further stated:

"Q. And if, in the meantime, during the period of 30 days, there was, say, for half the time the sun shining brightly and no rain falling, would you not consider that the effect of the sun and the atmosphere on the coal would tend, in a great measure, to remove a great deal of the moisture?

A. It would remove the moisture decidedly, yes" (pp. 1820-1).

In connection with this evidence the court will remember that the overages disclosed by Mills' books were just as great, and sometimes greater in the summer time than they were in the winter.

That a cargo of coal, while being transported from Nanaimo to San Francisco would neither decrease nor increase in weight, is also shown.

“Q. Now, assume that a cargo of coal was placed upon a ship at Nanaimo and transported to San Francisco and the coal is four days in transit to this port, and assume that the hatches of the vessel are closed in transit, in your opinion would there be any appreciable diminution of the weight of that coal during that period of time?

A. I should not think so.

Q. And, in your opinion, would there be any appreciable increase in the weight of that coal during that period of time?

A. Not if it is kept dry.

Q. The oxidation during that period of time would be practically nil, would it not?

A. It would amount to but very little, indeed.

Q. It would be negligible, would it not?

A. I think so” (pp. 1822-3).

And that the increased weight by oxidation within a period of a few months would be too infinitesimal to be observed, was also testified to:

“Q. Suppose that character of coal came here to San Francisco and was transferred from a ship to a bunker and from the bunker to a barge, and from the barge to another ship, for fuel purposes, in dry weather, the entire period of time from the date of shipment to the date of discharge into the liner being about

30 days, the oxidation during that period of time would be practically nil, would it not?

A. I should think so.

Q. It would amount to nothing; and assume, Doctor, that a pile of coal containing 32,000 tons were exposed to atmospheric influences for about 60 or 90 days, in dry weather in San Francisco, here, wouldn't the oxidation of that coal be practically nil?

A. I think that would be a negligible quantity.

Q. By that you mean practically nothing, do you not, Doctor?

A. I do, yes.

Q. There would be practically no change in the weight by reason of oxidation of the coal?

A. You appeal to me there as a geologist, and when we deal with periods there, there is some difficulty in understanding each other. I should say practically that the oxidation of coal, while we know that it goes on to a very considerable extent, it takes such long periods of time for it to oxidize, I should think that in commercial transactions, it is a negligible quantity."

* * * * *

"Q. Assume, Doctor, that in this coal, there, the sulphur in the coal varies in extent from a fraction of .1 per cent to 1.27 per cent, would not that amount of sulphur in the coal be of such a slight quantity that the oxidation would be practically nil for any period of time?

A. Well, I should not say for any period of time.

Q. Well, say for that month?

A. I don't think it would be of any particular importance.

Q. Or for 6 months; don't you think the oxidation for a period of 6 months would be practically nil?

A. It would be very little" (pp. 1824-5).

And again:

“Q. Now, assume, Doctor, that the pile of coal referred to in Mr. Olney’s question was not constant, but was being moved, changed every thirty or sixty days, wouldn’t the amount of oxidation in that pile of coal be also nil?

A. I think so.”

* * * * *

“Q. Is it not a fact, also, Doctor, that if this pile of coal were kept moving completely every thirty or sixty days, in ordinary winter weather, like we have here in San Francisco, would not the increase by the oxidation in that pile of coal be practically nil?

A. I think so.

Q. And don’t you think, also, Doctor, that the increase in weight by reason of moisture in this pile would be comparatively slight, where it is kept moving and completely moved in 30 or 60 days?

A. Of course, if the coal were handled, shoveled, or anything of that kind, so that the atmosphere could get at it, the moisture would soon disappear out of it” (p. 1827).

Nor can any comfort be derived by defendants from his redirect examination, for there he states:

“Q. Doctor, is the process of oxidation always a process by which the weight is increased, provided it does not reach the point of ignition; take it at normal temperatures?

A. No, oxidation does not always increase the weight of coal” (p. 1831).

And again, on recross examination:

“Q. Didn’t you always, in dealing with the question of the change in the condition of coal, consider the effect of oxidation, as affecting the weight of the coal, as practically of no importance?

A. That is the way I looked at it.

Q. As always being a mere negligible quantity to be considered?

A. Yes" (pp. 1832-3).

To demonstrate how unreliable were the conclusions of Professors Parr, Somermeier and Folsom, the Government produced in rebuttal, George W. Brown. This witness was connected with the naval coaling station at Tiburon. Between May or June, 1908, and the year 1911, the Government stored in one pile, at this station, approximately 83,000 tons of coal, *80 per cent of which represented fines* (p. 2231). If any faith is to be placed in the testimony of these experts, this was certainly a pile of coal, considering the percentage of fines, that presented an ideal condition for increase of weight from moisture content and oxidation. Describing the pile, this witness said:

"The pile was surrounded by a bulkhead 100 feet wide and 640 feet long, on top of which was a bunker occupying the middle 30 feet of the length. *The bunker was not covered and the coal was exposed to the weather*" (p. 2232).

The whole of this coal, with the exception of 740 tons, according to the intake weight, was discharged in the month of April, 1911. The overage resulting from this pile was between 200 to 400 tons (p. 2232) speaking in percentages between $\frac{1}{4}$ and $\frac{1}{2}$ of 1 per cent. That the weights taken were accurate is shown by the fact that at the time of its original discharge, as well as when checked out, the coal was weighed on an even beam (p. 2231).

In concluding our comments upon the expert testimony, we desire to invite the court's attention to two very significant circumstances:

(a) The principal claim of the experts was that the increase in weight of the coal was due to moisture content. Professors Parr and Somermeier had procured samples from the mine when the coal was broken from the seam and had ascertained its then moisture content. The assistant to Professor Folsom had likewise ascertained the moisture content of some of this coal after it had arrived in San Francisco. If, between the date of its arrival here and its final discharge into the steamers coaled, the commodity had increased in weight by moisture content, it is obvious that its exact increase from this source could have been demonstrated by taking a sample of coal from the barge at the time of delivery, or from the bunkers of one of the liners, and ascertaining what its moisture content was. The difference between its moisture content at the mine and its moisture content at point of ultimate delivery would represent the difference in weight (p. 1606). If several of such tests had been made, the claim made could have been established or disproved.

(b) The total overage
 resulting from all of
 the foreign coal
 handled by the West-
 ern Fuel Company be-
 tween April 1, 1906
 and January 1, 1913,
 was.....61996 tons 1374 lbs.

The overage representing the branch of the business under the supervision of Mills, which included the offshore bunkers and the barges, was33223 tons 542 lbs.

The exact overage appertaining to all of the foreign coals handled by the Western Fuel Company, outside of the offshore bunkers and barges, was.....28773 “ 833 “

During the period mentioned, the Western Fuel Company received and handled foreign coal, according to out-turn weight, to the amount of.....2138831 “ 473 “

The proportion of this coal handled by Mills' department was.....595492 “ 102 “

The difference between these figures is.....1543339 “ 371 “

which represents the total amount of foreign coal handled by the other departments of the Western Fuel Company, in which the overage was 28,773 tons 833 lbs., or 1.8%.

For the purpose of convenience, this calculation is based upon the out-turn or ascertained weights of the imported coal. If the bill of lading weights had been used, the result would have been proportionately the same.

According to the testimony of Norcross above cited, the coal in the bunkers and on the barges was practically always on the move. It was in the yards that the coal was permitted to accumulate in piles, resort being had to this coal only when the bunkers were getting low. If the expert evidence were to be relied on a much greater overage should have been found in that branch of the business with which Mills was not connected, and in which the yards were included, than upon the bunkers and the barges.

TESTIMONY OF OTHER COAL DEALERS.

On behalf of the defense, several witnesses were called, some of whom had been, and others of whom were still in the coal business, for the purpose of testifying to the existence of overage in the handling of coal.

According to Henry Rosenfeld—

“The coal that is thus in constant movement from ships to bunkers, and from bunkers to barges, etc., does not suffer very much by reason of humidity, and it is not as likely to increase in weight as the coal in storage in the yards up into the winter.”

This coal, said the witness

“is likely to undergo some increase in weight, but I could not say what the percentage of that increase would be. I should judge somewhere between 1 and 2 per cent” (p. 1952).

The witness, H. C. Richards testified that piles of 20,000, 30,000 or 40,000 tons would increase in weight when stored in a yard and subjected to water. He refused, however, to state what the percentage of overage would be (p. 1956). His cross-examination, however, disclosed what his views upon this subject were:

“Q. But where the coal is handled and shifted about, and not allowed to remain in the rain very long, is not the amount of the increase of weight rather insignificant?

A. It depends on the amount of rain; an inch of rain falling on coal increases the weight of that coal practically half of 1 per cent” (pp. 1958-9).

Robert Husband testified concerning piles of coal running from 10,000 to 30,000 tons, kept in stock for six months, stating that an overage would be experienced of from 2 to 3 per cent (p. 1963). If, however, the pile was put in the yard in the summer months and remained only about two or three months before the rain commenced, the increase would not be so great (p. 1966).

James J. McNamara, manager of the Central Coal Company, a company owned by the Western Fuel Company, testified that he had experienced overruns amounting to 3 or 4 per cent over the

custom-house weight (p. 1969). The reliability of this witness can be readily determined when we consider that he testified that the shortage upon the importation of Australian coal amounted to 4 per cent (pp. 1970-2). Upon learning that this statement was inconsistent with the record of discharges since the fire of 1906, he asserted that such was his experience 20 years ago (p. 1972).

It will be observed that in no instance do any of these witnesses attempt to touch either the general overage or any of the specific instances of overage resulting from that portion of the business conducted by the Western Fuel Company with which we are concerned. It should also be borne in mind that we have not before us the manner in which their business was being conducted.

RESPONSIBILITY OF DEFENDANT, JAMES B. SMITH.

While the evidence already referred to conclusively establishes the guilt of the defendant James B. Smith, his own testimony is instructive to this point.

That he kept himself constantly in touch with the manner in which the business was being conducted and all its details, was clearly shown.

“When I am in business I never miss a daily trip to the waterfront. I go there to keep myself informed as to what is going on around the bunkers and the plant in general, and to discuss with my subordinates the general condition of the business from day to day. I think

I could safely say that prior to this trial hardly a day elapsed without my going on top of the bunkers. Every cargo of coal discharged at our bunkers is visited by me. I go aboard the ships to see the condition and the character of the coal we are buying and paying for" (p. 2155).

* * *

"Mr. Mills, as well as all the other employees, send reports to my office. I receive reports from every department of the business. From six to eight such reports are turned into my office every day. I do not necessarily look at Mr. Mills' reports daily. I know that they are there if I wish to refer to them at any time. I have certainly, in looking at them, observed overruns in connection with the barges" (p. 2160).

And necessarily realizing that he was personally responsible for the acts and conduct of his subordinates, he states:

"I assume the responsibility for all my subordinates in the transaction and result of the business in general of the Western Fuel Company" (p. 2167).

Upon cross-examination this witness unconsciously gave recognition to the fact that the overage depended, if not altogether, to a very large extent upon the weigher. Said Mr. Smith:

"Q. You say that the principal cause of increase in the weight of the coal is water; that is a fact, is it?

A. No, I did not say that entirely.

Q. What is the principal cause of increase in the weight of coal stored in a coal yard?

A. Under what conditions?

Q. Under ordinary conditions.

A. Well, the conditions are entirely changeable.

Q. Well, say, in the summer-time, say from June to September?

A. What kind of coal?

Q. Bituminous coal, Canaimo coal?

A. *But who would do the weighing?*

Q. And then it makes all the difference in the world who does the weighing what the coal weighs, does it?

A. If you will give me the kind of a question I can answer—do I infer from your question, Mr. Sullivan, that the weighing shall be done under the supervision of the United States Government and the coal stored in our yard?

Q. In response to a question which I put to you, you said it makes a difference who does the weighing: What did you mean by that response?

A. I said it made a difference as to the weighing?

Q. Yes. Read what the witness said, Mr. Reporter.

(Record read by the reporter.)

A. I will qualify that Mr. Sullivan, by asking and by repeating my question: Am I to assume in that question that the weighing is done by United States Government officials as it is done there at the Folsom Street or any other bunker, over a scale? * * * ” (pp. 2196-7).

The manner in which this witness felt that he was justified in conducting the business of the Western Fuel Company is pictured by another portion of his cross-examination.

“Q. Do you remember the time the ‘Aztec’ was being loaded from the ‘Melrose,’ and that Chief Engineer Lindley, of the Pacific Mail

Steamship Company, complained of the quality of the coal?

A. No, sir.

Q. Don't you remember the occasion when the 'Aztec' was being loaded from the 'Melrose', and that the engineer complained about the quality of the coal that was being put into the 'Aztec' from the 'Melrose', and that upon the engineer making a complaint as to the quality of the coal that was being put into the ship 'Aztec', Eddie Powers had another barge brought in with the very same kind and quality of coal in it that was in the other barge, and that he made the engineer believe he was getting a better quality of coal, and that afterwards you met Powers and you made the remark to Eddie Powers: 'I always knew you would make a damn good man.'?

A. I don't remember it, Mr. Sullivan, but if you wish to assume it, I will say yes, and I thought he was a damn good man at one time, and I think if he had taken the advice of his superiors around our place he would be a damn good man today.

Q. And don't you know that you made that remark because he succeeded in getting discharged from the second barge the same kind of coal as the coal that had been condemned by the engineer of the 'Aztec' on the first barge?

A. If he did it, Mr. Sullivan, I would say he was a damn good man, yes, sir" (pp. 2206-7).

It is true that defendants and their witnesses denied many—not all—of the specific acts of fraud herein narrated, but the conflict thus created can avail defendants nought in this appellate tribunal. Upon this phase of the case, subject alone to review

in the court below by motion for a new trial, the jury's word is final. No useful or beneficial purpose would, therefore, be accomplished by commenting upon the remaining evidence offered by the defendants and not already alluded to, nor by pointing out how, on cross-examination, the effect of much of this evidence was destroyed.

This detailed review of the evidence and explanation of many of the exhibits introduced, has occupied much space and its reading by the court will consume much time. Considering the great length of the record, the many exhibits involved and the importance of the controversy to the parties, as well as the claim urged that no offense has been made out—a claim argued and presented with great earnestness and ability—we cannot help but feel that our labors may assist this court in rapidly reaching an intelligent understanding concerning the many angles of this bitterly contested controversy, to the end that exact justice may be done to all concerned.

Law of the Case.

I.

THE MAKING OF FALSE WEIGHTS AND FALSE AND FRAUDULENT RETURNS OF WEIGHTS ON IMPORTED COAL AND ON FOREIGN COAL FURNISHED AS FUEL TO AMERICAN REGISTERED VESSELS, FOREIGN BOUND, PURSUANT TO A CONSPIRACY TO DEFRAUD THE GOVERNMENT OUT OF IMPORT DUTIES AND TO OBTAIN A REFUND OF DUTIES CLAIMED TO HAVE BEEN PREVIOUSLY PAID, ARE WITHIN THE SCOPE AND PURPOSE OF THE INDICTMENT, EVEN THOUGH NOT THE RESULT OF THE FRAUDULENT OR WRONGFUL MANIPULATION OF THE SCALES AND WEIGHTS.

The first legal proposition urged by plaintiffs in error is that the Government failed to prove a conspiracy to defraud the United States Government out of import duties or moneys refunded upon draw-back claims, as the result of or to be accomplished by the *fraudulent manipulation of scales and weights maintained by defendants on the docks, wharves and barges of the Western Fuel Company*; and it is therefore claimed that even though the evidence be sufficient to establish a conspiracy to so defraud the Government by making false weights and false and fraudulent returns of weights, nevertheless, the judgment of the court below must be reversed, because of a variance between the conspiracy alleged and the conspiracy proven. This point is bottomed upon the contention that in the indictment it is alleged that the conspiracy was to defraud the Government *solely and exclusively* by the "fraudulent manipulation of scales and weights", to be, and which were maintained upon

the docks, wharves and barges of the Western Fuel Company; which language it is claimed is descriptive of the offense charged, and therefore must be proven as alleged.

The construction thus intended to be given to the indictment in the instant case is not only without justification, but the language used is not even susceptible of the meaning imputed to it, nor do any of the decisions cited by opposing counsel sustain the point raised, or the argument advanced. As purely a question of construction is involved, a mere reading of the indictment ought to suffice. Says the indictment:

“That the said defendants and said divers other persons whose names are to said Grand Jurors unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company, * * * and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, * * * by making and causing to be made *false weights and false and fraudulent returns of weights* of such cargoes and importations of coal, and by further *fraudulently weighing and causing to be weighed* by themselves and by the Pacific Mail Steamship Company, a corporation * * *, and reported to the United States, the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vesels pro-

pelled by steam, and engaged in trade with foreign countries * * * and which ships or vessels were registered under the laws of the United States; and further to defraud the United States by making, and causing to be made, false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service * * *, and for the purpose of carrying out such conspiracy, combination and agreement, to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company * * *, scales and weights which were to be and were fraudulently manipulated by the defendants, to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, * * * and to further cause fraudulent affidavits and statements to be made by the defendants and by each of them, to the officers of the Government of the United States, * * * and to the Pacific Mail Steamship Company, a corporation, * * * for the purpose and to the end that said Pacific Mail Steamship Company should claim from the United States a greater rebate on the drawback of coal duties permitted * * *, than the true weight of said coal would permit said Pacific Mail Steamship Company to claim, or was due the said Pacific Mail Steamship Company.

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, *to be incorrectly measured and weighed*, to the end, and for the purpose, that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weights" (pp. 6-8).

We must confess that we are unable to comprehend, in view of the language quoted, how it can be seriously urged that the conspiracy alleged was to defraud the United States only by the "manipulation of scales and weights" or how it can be successfully claimed that the words relied on are descriptive of the offense charged.

The offense charged in the indictment is the conspiracy "to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company * * * and * * * out of a large portion of the duties due to the United States on divers ship loads and cargoes of coal so imported by said Western Fuel Company and other persons. * * * " The language quoted, describes the offense, and coupled with the allegation of an overt act, would be, in and of itself, without further elaboration, sufficient to inform the defendants to a common certainty, of the offense charged against them. The indictment then proceeds, and definitely and concisely, by apt and well chosen words, asserts that the Government was to be defrauded in the respects pointed out:

(a) "By making, and causing to be made, false weights, and false and fraudulent returns of weights";

(b) "By fraudulently weighing, and causing to be weighed, and reported to the United States, the weight of all importations of coal loaded from the

bunkers and barges of said Western Fuel Company for fuel" on American registered vessels;

(c) By making, and causing to be made, false returns, weights and entries of coal shipped and loaded on board transports and other Government ships;

(d) By causing fraudulent affidavits and statements to be made by the defendants to the officers of the Government of the United States, and to the Pacific Mail Steamship Company, so that the latter company could claim a greater rebate on the drawback of coal duties than was permitted; and

(e) By causing all coal weighed in or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed.

(f) By fraudulently manipulating the scales and weights so as to record the false weight desired.

The offense charged against the defendants is that of engaging in an unlawful and illegal conspiracy. The language "and to that end, and for the purpose of carrying out said conspiracy * * * to maintain on the docks, wharves and barges owned, operated, controlled and kept by said Western Fuel Company, and by the said defendants * * * scales and weights which were to be and were fraudulently manipulated by the defendants", cannot be construed to be descriptive of the conspiracy which is the offense alleged. Such an interpretation would do violence to the instrument itself, as well as to the

evident intention of the pleader. It was intended to be, and is but one of the various methods or means which the defendants might pursue to accomplish the purposes and objects of the conspiracy which is the gist and gravamen of the offense.

In fact the position taken by counsel for plaintiffs in error, if pushed to its final conclusion, is that the conspiracy alleged was to fraudulently manipulate the scales and weights, their language being:

“The gravamen then of the indictment is that the defendants conspired to manipulate fraudulently the scales as well in the weighing of the coal upon the docks, at the time of its importation, as in the weighing of the coal upon the barges at the time of its delivery to the draw-back steamships * * * ” (p. 16).

The only criticism which can be logically urged against the indictment is that it unnecessarily, and with greater particularity than was essential, attempts to point out the various means by which the conspirators intended to carry the conspiracy into effect, matters which, according to many decisions, some of which emanate from this very court, constitute no essential part of an indictment for conspiracy. The indictment in this case was framed under Section 5440 (Sect. 37 Criminal Code) of the Revised Statutes which provides:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy

shall be liable to a penalty of not more than \$10,000, or to imprisonment for not more than two years, or to a fine and imprisonment in the discretion of the court.”

The gist and gravamen of the offense is the *conspiracy*, that is, the unlawful, fraudulent and corrupt combination and agreement to defraud.

U. S. v. Benson, 70 Fed. 591;

Banrion & Mulkey v. U. S., 156 U. S. 464
(39 L. Ed. 494).

And it has been repeatedly held, although the point is but herein indirectly involved, that an indictment under Section 5440 of the Revised Statutes is sufficient if it alleges the character of the conspiracy in which the defendants engaged, describing it with sufficient particularity to inform the defendants of the charge made against them, and points out an overt act committed by one or more, in furtherance thereof.

U. S. v. Benson, 70 Fed. 591 (decided by this court),

was a conspiracy case in which it was claimed that the indictment was insufficient for the reason, among others, that the facts alleged were not sufficient to advise Benson of what particular offense he was called upon to meet. The lower court had discharged the defendant on habeas corpus because of the insufficiency of the indictment. From the order of discharge, the Government appealed. Judge Hawley, delivering the opinion of this court, in reversing the order of the court below, said:

“Is it necessary to allege that the defendants named in the indictment, or either of them, would profit by the conspiracy, *or to state the means by which the conspiracy was to be successfully carried out, or that any fraud was actually consummated, or that it should appear upon the face of the indictment in what particular manner the acts alleged to have been performed in pursuance of the unlawful agreement would tend to accomplish the object of the conspiracy?* What facts are necessary to be alleged in the indictment in order to constitute an offense punishable under the provisions of section 5440? It will be observed by reference to the language of this section that it embraces two separate and distinct offenses, viz: First, a conspiracy to commit an offense against the United States; second, a conspiracy to defraud the United States in any manner or for any purpose. It is made an essential element of these offenses that one or more of the alleged conspirators must have done some act to effect the object of the conspiracy. The facts alleged in the indictment must be considered with reference to the second offense above stated, to wit, a conspiracy to defraud the United States. * * * There are, of course, certain general rules, that are well settled, which apply to all indictments, and to these rules it will be necessary to refer.

At common law ‘conspiracy’ is defined to be the unlawful confederacy and agreement of two or more persons to do an unlawful act, or a lawful act by unlawful means. The conspiracy constituted the offense, and it was frequently held that it was unnecessary to state the particular means by which the government or party was to be defrauded; that the felonious intent being charged, the means to effect the fraud were matters of evidence for the consideration of the jury; nor was it necessary to aver any overt act. The gist of the offense was the

entering into the conspiracy. The bare combination and agreement constituted the crime. (Citing cases.)

But the national courts cannot resort to the common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon congress to define what are crimes, to fix their punishment, and to confer jurisdiction for their trial. (Citing cases.) We must therefore look elsewhere than to the common law for the test to be applied which will determine the validity of the indictment. Where the offense is purely statutory, having no relation to the common law, it is, as a general rule, sufficient to charge the defendant, in the indictment with the acts coming fully within the statutory description, in the substantial words of the statute, without any further elaboration. To this general rule should be added the qualification that the description of the offense in the indictment must be accompanied by a statement of all the particulars essential to constitute the offense, and must be sufficient to inform the accused as to what he must be expected to meet at the trial. *U. S. v. Simmonds*, 96 U. S. 362; *U. S. v. Carll*, 105 U. S. 612; *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Potter v. U. S.*, 155 U. S. 438, 15 Sup. Ct. 144.

Keeping in sight these general principles we now come to the question as to what a conspiracy is and what facts are necessary to constitute the offense under the particular provisions of Section 5440 upon which the present indictment is based."

And, after defining "conspiracy" and referring to other decisions, the opinion proceeds:

“An indictment under Section 5440 which avers the conspiracy and then sets out the overt acts done to carry it into effect, is sufficient and it is not necessary to aver the means agreed on to effect the conspiracy. U. S. v. Demmee, 3 Woods, 50 Fed. Cas. No. 14,948; U. S. v. Goldman, 3 Woods, 192 Fed. Cas. No. 15,225; U. S. v. Dustin, 2 Bond, 332 Fed. Cas. No. 15011; U. S. v. Sanche 7 Fed. 715; U. S. v. Gordon, 22 Fed. 250; U. S. v. Adler, 49 Fed. 736; See, as to other offenses, U. S. v. Ulrici, 3 Dill. 535, Fed. Cas. No. 16594; U. S. v. Simmonds, 96 U. S. 360; U. S. v. Brittan, 107 U. S. 655, 661, 2 Sup. Ct. 512.

From the authorities we have cited and quoted from, it will be observed that the gist of the offense under the statute, as well as at common law, is the conspiracy. The cases quoted from and cited are principally decisions rendered in the respective circuits and have no binding force upon this court except such as may be found in the soundness of the reasons therein given. Our attention, however, has not been called to any decision of the supreme court which takes issue with the circuit courts as to the requirement of an indictment under the clause of Section 5440, declaring it to be a conspiracy for two or more persons to conspire to defraud the United States in any manner or for any purpose. On the other hand, there are decisions which substantially affirm the doctrines announced in the circuit court. Some of them have already been cited in the course of this opinion. In *Dealy v. U. S.* 152 U. S. 539, 14 Sup. Ct. 680, the question was as to the sufficiency of the indictment to sustain a conviction under Section 5440 for a conspiracy to defraud the United States of the title and possession of large tracts of land of great value by means of false, feigned, illegal and fictitious entries of said lands under the homestead laws

of the United States; the said lands being public lands of the United States, open to entry, etc. It was there, among other things, objected that the indictment did not allege any particular tract of land of which the defendants conspired to defraud the United States. Mr. Justice Brewer, in delivering the opinion of the court said:

‘It is true no tract is named by number of section, township, and range, and the language is broad enough to include any or all the public lands of the United States situate within that county and subject to homestead entry at the land office. *But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete, even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified.*

* * * * *

Viewed from the standpoint of good pleading, the weakest point in the indictment is perhaps found in the descriptive words: ‘By the means and in the manner following: That is to say:’ But in answer to this, as well as to the further question whether it properly informs defendant Benson as to what he is accused of, we content ourselves by quoting the language of the supreme court in reply to like objections,

in *Potter v. U. S.*, 155 U. S. 438, 445, 15 Sup. Ct. 144, as follows:

‘It is generally true, as claimed, that where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid; but that proposition does not seem to be in point, for it is not claimed that the testimony did not show just such a writing as is charged to have been made by the defendant and surely it cannot be claimed that unnecessary matter of description must be proved otherwise than as it is stated. While there is plausibility in the contention of counsel, yet we think it would be giving an unnecessary strictness to the language of the indictment to adjudge it insufficient, or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution; and that, as we all know, is the substantial purpose of a written charge.’

The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.”

The case of

Perrin v. United States, 169 Fed 17,

(also from this circuit), is likewise in point. In that case, Mr. Peter F. Dunne, one of the attorneys for plaintiffs in error, represented Perrin. Mr. A. P. Black, his present associate, represented the Government. The decision was by Morrow, Circuit Judge. There it was objected that the indictment was insufficient because its allegations were not clear and concise, and the purpose of the conspiracy was not sufficiently set forth. In holding

the indictment sufficient, notwithstanding these alleged defects, the learned judge stated:

“The indictment is unquestionably open to criticism but giving effect to all of its allegations, including the agreement between Benson and the plaintiff in error, set forth in the indictment, and construing these allegations, in view of the statutory provisions relating to the exchange of lands of the state within forest reservations of the United States for lands outside of these reservations, we think the crime of conspiracy is sufficiently charged; but the criticism is directed mainly to allegations of the first count relating to the means employed to carry the conspiracy into effect.

* * * * *

The gist of the offense is the unlawful combination. *Bannon and Mulkey v. U. S.* 156 U. S. 464, 468, 15 Sup. Ct. 467, 39 L. Ed. 494. The unlawful combination is sufficiently charged in the indictment in the allegation that the defendants conspired together to ‘defraud the United States of the title to and possession of large tracts of land’ described in the indictment. *It is not necessary to aver the means employed to carry the unlawful combination into effect.* *United States v. Benson.* 70 Fed. 591; 17 C. C. A. 293. Having averred the use of such means as will clearly apprise the defendant of the offense of which he is charged, we think the allegations are sufficient.”

See, also,

Benson v. United States, 169 Fed. 31.

In

Mayes v. United States, 179 Fed. 610,

also from this circuit, the question as to whether it was essential to plead in an indictment the means

by which a conspiracy alleged was to be carried out, was directly presented. It was there held that where the conspiracy alleged was to defraud the United States, the means by which the conspiracy was to be carried into effect constituted no essential part of the indictment. In this case, the court, quotes from *Evans v. United States*, 153 U. S. 584; 38 L. Ed. 840, where it is said:

“While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove”

In

Jones v. United States, 179 Fed. 584,

a companion case to the one last cited, also from this circuit, at page 593, in passing upon objections to the indictment, the following language is used:

“The charge in the indictment is based upon Section 5440 of the Revised Statutes which provided:

‘If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable,’ etc.

In *Bannon and Mulkey v. United States*, 156 U. S. 464, 468, 15 Sup. Ct. 467, 469, (39 L. Ed.

494) the Supreme Court, in referring to this statute said:

‘At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges. (Citing cases.) But this general form of indictment has not met with the approval of the courts in this country and in most of the states an overt act must be alleged. The statute in question changes the common law only in requiring an overt act to be alleged and proved.’

Aside from this statutory requirement, the rule is that an indictment for conspiracy, like any other indictment, is sufficient if the facts stated fairly and reasonably, inform the accused of the offense with which he is charged. (Citing cases.)

In *Cochran and Sayre v. United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 (39 L. Ed. 704,) the Supreme Court, discussing the sufficiency of indictments, said:

‘The true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.’ ”

In

United States v. Shevlin, 212 Fed. 343,

where the defendants were charged with having engaged in a conspiracy to defraud the United States

out of customs duties, the court, in holding that the indictment was sufficient, although it did not allege the means by which it was carried out, said:

“The tenth ground of demurrer questions the sufficiency of the description of the manner or means by which the defendants intended or caused the foreign merchandise to be passed through the United States custom lines; the eleventh, that it does not sufficiently allege any criminal intent on the part of the defendants. The general purpose and scope of the conspiracy are clearly described in the indictment. *It is not necessary to allege the exact manner or means by which it is to be carried out.*
* * * ”

In

Williamson v. United States, 207 U. S. 425;
52 L. Ed. 278,

in stating what an indictment for conspiracy should contain, it is said:

“But in a charge of conspiracy, the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy.”

To the same effect is

Crawford v. U. S., 212 U. S. 188; 53 L. Ed.
465-475.

Without quoting the language used in the decisions, we invite the court's attention to the following cases in which it is held that the indictment is sufficient if a conspiracy to defraud the United States in language sufficient to apprise the de-

fendant of the character of the offense with which he is charged, is set forth, and an overt act alleged, without the necessity of pleading the means by which the conspiracy is to be made effective.

United States v. Gordon, 22 Fed. 250;

United States v. White, 171 Fed. 775;

United States v. Stamatopoulous, 164 Fed. 525;

Commonwealth v. Hightower, 149 S. W. 971;

Dwinnell v. U. S., 186 Fed. 754;

Sect. 28, Vol. 5, Ruling C. L., p. 1081.

Applying the rule declared by the decisions cited, to the present case, the indictment would have been sufficient had it omitted all reference to the means by which the conspiracy was to have been carried out, or the unlawful and corrupt purpose of the indictment carried into effect, leaving intact that portion of the indictment in which the conspiracy is charged and the overt acts set forth. The remaining portion of the indictment might, therefore, be regarded as mere surplusage. But, even though it be assumed, for the purpose of the argument, that it was essential that the means by which the fraud was to be perpetrated was required to be pleaded, and because pleaded, proved, nevertheless if, as the indictment in this case points out, this fraud was to be committed by various methods, proof of one or more of such methods would be sufficient even though all were not established, and in such event, no claim can be successfully urged that

any variance exists between the proof and the pleading.

In

U. S. v. Cassidy, 67 Fed. 698, 707,

Judge Morrow, in charging a jury in a conspiracy case, used this language :

“This brings us to a feature of this charge of conspiracy which you will bear in mind. It is not incumbent upon the prosecution to prove that all of the means set out in the indictment were, in fact, agreed upon to carry out the conspiracy, or that any of them were actually used to put into operation. It will be sufficient if it be established to your satisfaction, and beyond a reasonable doubt, that one or more of the means described in the indictment were to be used to execute that purpose.”

Donaldson v. U. S., 208 Fed. 4-7,

where, speaking of various overt acts alleged, it was said, by Circuit Judge Gilbert, speaking for this court :

“These were acts which tended to effect the object of the conspiracy and it was enough if one of the acts charged, was proven to have been done.”

In *Jones v. U. S.*, 179 Fed. 584-600, *supra*, the following is stated (p. 600; language of Judge Morrow) :

“It is nevertheless contended that the court was in error in refusing to give the following instruction requested by the plaintiff in error:

“If the jury believe from the evidence that the defendant Williamson was in a conspiracy, such as is described in the indictment, with Boggs or other persons not mentioned in the

indictment, and that the defendants Mays, Jones and Sorenson, or any of them, either with one another, or other persons not mentioned in the indictment were in a conspiracy, but that there was no common understanding or agreement between the two groups, but that each group was acting for itself and independent of the other, then you must find the defendant not guilty.'

That the court was correct in refusing this instruction was obvious. The Government was not required to establish every allegation contained in the indictment. It was not required to prove that all the overt acts alleged were committed, nor was it required to prove that all the defendants named in the indictment were engaged in the conspiracy. It was sufficient to constitute the conspiracy charged in the indictment, to show that there was a combination of two or more persons to defraud the United States, and that one or more of such parties did an act to effect the object of the conspiracy charged."

Ency. of Evidence, Vol. 3, p. 416;

U. S. v. Howell, 56 Fed. 21;

State v O'Neil, 33 Pac. (Kan.) 287;

State v. Hewes, 57 Pac. (Kan.) 959;

Commonwealth v. Meserve, 27 N. E. 999;

State v. Bledsoe, 47 Ark. 233;

Crane v. U. S., 162 U. S. 626; 40 L. Ed. 1097.

In

People v. Everest, 3 N. Y. S. 612-15, the proposition herein involved is well stated by Barker, P. J.

"It is contended by the learned counsel for the appellants that as the indictment charges an indivisible crime, consisting of many elements which are unified by the form of the

allegations, the prosecution cannot succeed without proving all the elements set out as constituting a crime. This argument fails to recognize the legal principle which has been already stated, that the gist of the offense consists in the agreement, which constitutes but a single act. The conspiracy is complete when the combination is perfected. It is never necessary for the people to prove all the allegations in the indictment, if those which are supported by the evidence constitute the crime charged therein. If the crime is set out with false circumstances, they may be rejected as not necessary to be proved. Mr. Phillips says it is a 'universal principle, which runs through the whole of the criminal law, that it will be sufficient to prove so much of the indictment as charges the defendant with a substantive crime; and illustrates the rule by saying, 'that, in an indictment for murder, the malice is but a circumstance in aggravation, and may be rejected, and the accused be convicted of manslaughter.' (Citing cases.) The true rule is stated in *Bork v. People* 91 N. Y. 13, viz:

'Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together and charge the defendant to have committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the other.' See also, *People v. Davis*, 56 N. Y. 95."

In

Crain v. U. S., 162 U. S. 626; 40 L. Ed. 1097, it was claimed that the second count in the indictment was materially defective because it charged the commission of separate and distinct felonies. In holding that the indictment was sufficient, that

the count was not objectionable, and that proof that the defendant had committed the offense charged in only one of the ways alleged, would be sufficient to sustain a conviction, the court cited and analyzed a number of decisions, and then proceeded:

“We are of the opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorneys, orders, certificates, receipts or other writing. The statute was directed against certain defined modes for accomplishing a general object and declaring that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years, nor more than ten years, or by imprisonment for not more than five years, and a fine of not more than \$1,000. We perceive no sound reason why the doing of the prohibited thing in each and all of the prohibited modes, may not be charged in one count so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charged contained in a single count; for a judgment on a general verdict of guilty, upon that count, will be a bar to any further prosecution in respect of any of the matters embraced by it.”

It is likewise unnecessary to prove each of the various ways the Government might be defrauded by the conspiracy alleged, or what, if anything, was

in the minds of the conspirators as to the manner in which they intended to effectuate its objects.

Crawford v. U. S., 212 U. S. 188; 53 L. Ed. 469;

Deely v. U. S., 152 U. S. 539; 38 L. Ed. 535-6;

Hush v. U. S., 100 U. S.; 25 L. Ed. 539;

Hyde v. Shine, 199 U. S. 52; 50 L. Ed. 90.

LACK OF MERIT DEMONSTRATED.

That counsel representing plaintiffs in error did not themselves believe that there was any substance to the point here under consideration until it became necessary to urge it in an attempt to reverse the judgment of the lower court, must be obvious. If, as claimed by counsel, the only crime charged was a conspiracy to defraud the United States in the manner alleged, by a manipulation of scales and weights, and that proof that the fraud was to be perpetrated by some other method would not establish the offense charged, all evidence tending to establish that the Government was defrauded excepting by a manipulation of the scales and weights, was essentially immaterial. Yet, an examination of the record will disclose that no protest was voiced by any one of the numerous counsel representing plaintiffs in error in the court below, against the admission of such testimony. The record will also show that the lower court was not requested to give any instructions which would in-

vite the juror's attention to the legal proposition now being urged, or confine their deliberations to a consideration of only such evidence as may have been introduced, showing some physical interference with the scales and weights. In fact, the instructions requested by defendants—and they were all given by the court—gave recognition and assent to the argument here made by the Government.

POINT URGED CANNOT NOW BE CONSIDERED.

Upon a writ of error, the jurisdiction of this court is limited to a review of the errors alleged to have been committed by the trial court. No objection was made before that tribunal to the form or sufficiency of the indictment. In fact, its sufficiency is not here challenged. No objection was made to the introduction of evidence which it is now claimed, does not tend to establish the offense charged. No attempt was made by requested instructions, or by appropriate motions to strike out, to remove from the consideration of the jury, the evidence which conclusively demonstrates that the conspiracy charged was entered into, and the Government actually defrauded in pursuance thereof by many of the methods described in the indictment. The action of the lower court was never invoked, or attempted to be invoked, with a view to raise the question now being presented. Under such circumstances, the question is not now open for review.

Jones v. U. S., 179 Fed. 592, and cases there cited.

II.

**THE DISCRETION EXERCISED BY THE LOWER COURT IN
DENYING DEFENDANTS' MOTION FOR A NEW TRIAL, CAN-
NOT BE INTERFERED WITH.**

It is claimed by defendants in error that the lower court committed an abuse of discretion in denying their motion for a new trial, for which reason the judgment should be reversed.

In the argument advanced in support of this claim it is asserted that it was the duty of the lower court to have granted the new trial; first, because the evidence was entirely insufficient as matter of law to warrant the conviction of any of the defendants; and secondly, because of misconduct on the part of some of the jurors.

In support of their motion for a new trial defendants filed a number of affidavits, which are contained in the record. In passing upon this motion, the court considered not only the evidence introduced and the proceedings had upon the trial, but likewise all of the affidavits filed by both parties to be used upon the hearing of said motion. Under these circumstances, the order made by the lower court denying defendants' motion for a new trial, was the exercise of a discretion vested exclusively in the lower court, which, under the authorities, cannot be interfered with or reviewed upon writ of error. The rule as stated is given recognition by counsel for defendants. It is asserted, however, that there is a well-defined

exception to the rule, which permits the review of an order denying a new trial, where it results from an abuse of the discretion confided to the lower court. While there is an exception to the rule, it is not accurately defined by opposing counsel, nor is the argument advanced by them sustained by decisions of the federal courts.

If the trial judge refuses to hear, entertain or decide a motion which under the law he is required to hear, entertain and determine, or if through some mistaken view of the law he refuses to consider affidavits or other evidence properly offered in support of the motion for a new trial, then and then only can the appellate tribunal interfere. On the other hand, if the motion is entertained and is finally decided upon its merits, and all evidence and proofs offered are considered, the decision of the trial court upon such motion is final.

The proposition as stated is sustained by an unbroken line of decisions. In the case of

Mattox v. U. S., 146 U. S. 140, 153; 36 L. Ed. 917-921.

The lower court excluded certain affidavits offered in support of the motion for a new trial, in which it was attempted to show misconduct on the part of the jury, and then denied the motion. The affidavits excluded were of course not considered. Holding that under these circumstances the order

could be reviewed on writ of error, Mr. Chief Justice Fuller, speaking for the court, said:

“The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error (citing *Henderson v. Moore*, 9 U. S. 5 Cranch, 11; *Newcomb v. Wood*, 97 U. S. 581), but in the case at bar the district court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved.”

And, after holding that the affidavits should have been admitted, the decision proceeds:

“These affidavits were within the rule, and being material, their exclusion constitutes reversible error.”

The distinction pointed out in the case last cited is pointedly shown by the case of

Felton v. Spiro, 78 Fed. 576.

In that case the judge of the lower court refused to grant a new trial, upon the ground that he had no power to set aside a verdict because it was against the weight of the evidence. This is made clear from the opinion rendered by the trial judge, a portion of which is set forth in the decision of the court of appeals. In reversing the order of the court below, Circuit Judge Taft, speaking for the court, said:

“The next, last, and chief assignment of error is based on the action of the trial court in refusing to exercise his discretion in respect

of the motion of the defendant to set aside the verdict because contrary to the weight of the evidence. The language and ruling of the court in passing upon the motion for a new trial is incorporated in the bill of exceptions.

* * * * *

The perusal of this opinion leaves no doubt in our minds that the learned judge intended to refuse, and did refuse, to consider or act upon the motion for a new trial, in so far as it was based on the ground that the verdict was against the weight of the evidence, because he was of opinion that the court had no power to set aside a verdict on such a ground.

* * * * *

A motion for a new trial is, of course, addressed to the discretion of the court, and, if the court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of the jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, *it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so*, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error. In *Mattox v. U. S.*, 146 U. S. 140, it was held

that, where the trial court excluded affidavits offered in support of a motion for a new trial, and in passing upon the motion exercised no discretion in respect of the matters stated in the affidavits, the question of the admissibility of the affidavits was preserved for the consideration of the Supreme Court on writ of error, notwithstanding the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court. This furnishes direct support for the view that the refusal of the trial court to consider at all as a ground for new trial that the verdict was contrary to the evidence may be assigned for error here," and the judgment was reversed with instructions to determine the motion for a new trial on its merits.

The same distinction was again pointed out in

Wells Fargo & Co. v. Zimmer, 186 Fed. 131,
133,

where it is said:

"Plaintiff in error cites and places reliance upon the case of *Mattox v. U. S.*, 146 U. S. 140. In that case the trial court excluded the affidavits offered in support of the motion for a new trial. The Supreme Court announced the rule of law as being that the allowance or refusal of a new trial rests in the sound discretion of the court, which cannot be made the subject of review by writ of error, but held that, as the trial court excluded the affidavits in support of the motion and did not consider them, the court in that respect committed an error and the action of the court in excluding the evidence offered in support of the motion for a new trial was subject to review.

In the case before us the court received the affidavits in evidence and based its ruling upon

full consideration thereof, and its judgment overruling the motion is not subject to review."

In Dwyer v. U. S., 170 Fed. 160, 165,
the only ground upon which an appellate tribunal can interfere with an order denying a motion for a new trial is made clear. In that case the lower court refused to entertain the motion for a new trial at all. In reversing the judgment this court, through Judge Morrow, said:

"We are clearly of the opinion that the District Court sitting at Boise City had authority to pass upon the motion for a new trial in this case, and, as it appears that it was convenient for counsel on both sides to present the motion at that place and applied to the court to do so, it was the duty of the court to have heard and determined the motion on its merits.

It is an established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error. (Citing cases.) But where the trial court excludes affidavits and exercises no discretion with respect to the matters therein stated, the action of the court is preserved by exception for review by the appellate court. (Citing *Mattox v. United States*, 146 U. S. 140, 147; *Ogden v. United States*, 112 Fed. 523, 525.)"

To the same effect see

Haws v. Victoria M. Co., 160 U. S. 311-314;
40 L. Ed. 439.

Higgins v. U. S., 185 Fed. 710-717.

James v. Evans, 149 Fed. 136.

Van Stone v. Stillwell, 142 U. S. 128-138;
35 L. Ed. 963.

Holder v. U. S., 150 U. S. 90-92; 37 L. Ed.
1010.

Gourdaine v. U. S., 154 Fed. 460.

Herman v. American Bridge Co., 167 Fed.
934.

Youtsey v. U. S., 97 Fed. 947.

Board v. Keene, 108 Fed. 516.

Newcomb v. Wood, 97 U. S. 581; 28 L. Ed.
1085.

Railroad Co. v. Horst, 93 U. S. 291; 23 L.
Ed. 898.

Ogden v. U. S., 112 Fed. 525.

Colt v. U. S., 190 Fed. 305-309.

Blitz v. U. S., 153 U. S. 308; 38 L. Ed. 725.

An examination of the authorities cited by plaintiffs in error to the point that the order denying a new trial can be reviewed under writ of error, will demonstrate that upon the record herein the point is destitute of merit.

**IF THE ORDER DENYING A NEW TRIAL WERE REVIEWABLE,
NEVERTHELESS THE AFFIDAVITS FAILED TO DISCLOSE
ANY REASON FOR INTERFERENCE BY THIS COURT.**

The principal claim urged by plaintiffs in error why the lower court should have granted a motion for a new trial, was because of the alleged misconduct of the jurors. An examination of the affidavits filed in support of this ground will disclose

that the alleged misconduct consisted: First, of the reading by some of the jurors of an article appearing in the Oakland Tribune; secondly, because of alleged statements made by two of the jurors assimilating the facts in this case to the sugar fraud cases; and thirdly, to the reading by the jurors of articles and editorials appearing during the trial in various of the San Francisco newspapers.

The article appearing in the Oakland Tribune (pp. 2300-2301) in no way, even remotely, alluded to the case on trial. Even though it be assumed that this article was read by some of the jurors, it would be impossible to conceive how it could create in their minds any prejudice against the defendants, or to any extent influence their judgment.

Considerable stress is laid upon the affidavit made by the juror William K. Beans, in which he states that Fred Becker handed to him

“to read a newspaper article referring to, or containing, a series of articles distinctly hostile to the defendants herein, commenting at some length in a manner adverse to their defense herein, and likening this case to the American Sugar Refining Company case in New York, in which some of that company’s officers or employees had been convicted for false weighing” (p. 2308).

It finally developed, however, that the newspaper article referred to was the one published in the Tribune, to which reference has already been made (affidavit of Fred Becker, pp. 2485-2487), and

that Mr. Beans was therefore mistaken in describing the newspaper turned over to him by Becker.

In the affidavits filed by the defendants there was also imputed to jurors Thomas E. Mahar and Fred Becker statements indicating that there was some similarity between the sugar fraud cases and the case on trial. That any such statements were made or any such language used was positively and emphatically denied by Mr. Mahar (pp. 2471-2473) as well as by Mr. Becker (pp. 2485-2489), and their testimony in this regard is corroborated by the affidavits of some of the other jurors (affidavit of R. H. Gatley, pp. 2473-2475; affidavit of L. P. Bolander, pp. 2477-2479).

These conflicting statements were unquestionably considered by the trial judge and resolved in favor of the Government.

That neither the reading of the article contained in the Oakland Tribune nor the reading by the jurors of any of the articles contained in the San Francisco newspapers published during the trial can be held to constitute such misconduct on the part of the jurors as to entitle the defendants to a new trial, is well settled.

Holt v. U. S., 54 L. Ed. 1022;

U. S. v. Reed, 12 How. 361; 13 L. Ed. 1023;

U. S. v. Francis, 144 Fed. 520;

U. S. v. Gilbert, 2 Sumn. (U. S.) 19;

People v. Leary, 105 Cal. 400;

People v. Field, 149 Cal. 464;

People v. Fernandez, 3 Cal. App. 689;
Fogarty v. State, 80 Ga. 450;
State v. Cucuel, 31 N. J. Law, 249;
Moore v. State, 36 Tex. Cr. Rep. 88;
Colt v. U. S., 190 Fed. 305; certiorari denied, 223 U. S. 729; 56 L. Ed. 633;
Mattox v. U. S., 146 U. S. 140; 36 L. Ed. 917.

In this connection it might also be well for us to direct the court's attention to the fact that but little, if anything, suggested by the numerous articles published from time to time in the San Francisco newspapers was inconsistent or in conflict with the facts disclosed by the evidence introduced in the presence of the jurors. But however this may be, the jurors having heard the evidence, of course knew whether the articles were true or false. If false, they could in no way have affected them. This case in this respect is no different to any other important case that is tried. Reports of evidence introduced are constantly published, and if mistrials are to result merely because the newspapers have been read by jurors, few convictions could be sustained unless the jurors were prevented from separating after the trial had actually commenced.

But aside from this, the defendants are not in a position to successfully assert that any prejudice resulted to them from the reading by the jurors of the articles published in the San Francisco newspapers during the trial.

Upon the hearing of the motion for a new trial the Government used the affidavit of W. H. Tidwell, in which he states:

“Upon a number of occasions during said trial, before court would convene, some of the jurors who had been impaneled to try and who were engaged in trying said action, read newspapers. Upon said occasion said jurors so reading said newspapers would be located in the corridor of the United States Postoffice Building, which was situated just outside of and which connected with the courtroom in which the sessions of said court were held. The fact that said jurors upon said occasions were so reading said newspapers was, of course, apparent to all persons passing through said corridor and into said courtroom at the time said jurors were so located in said corridor reading said newspapers” (p. 2483).

He then points out that when under examination touching their qualifications to act as jurors a number of the proposed jurors were questioned regarding the newspapers for which they subscribed and which they were in the habit of reading, and that he (Tidwell), during the trial, had read practically all of the newspaper articles contained in the affidavits. He then proceeds:

“Upon and according to my information and belief, the fact that said articles, items and editorials were so published in said respective newspapers was known by the defendants in this action, and by the various attorneys representing said defendants, on or about the date upon which each of said articles, items and editorials were so published in said respective newspapers. Upon and according to my in-

formation and belief, said defendants and their said attorneys knew, prior to the termination of the trial of said action, that all of said newspaper articles, items and editorials had been so published, and were familiar with the matters set forth in each of said articles, items and editorials.

At no time during the trial of the above-entitled action did any of the said defendants, or the attorneys for said defendants, or any of them, request the above-entitled court, or Honorable Maurice T. Dooling, judge therein presiding, to instruct, charge or admonish said jury not to read any item, article or editorial that might appear or be published in any newspaper regarding said action, or any of the issues involved therein, or any of the parties thereto, or any of the witnesses that were or might be called upon the trial of said action, or bearing or commenting upon the subject matter of said action; nor did said defendants, or any of them, or any of their counsel, at any time during said trial or at the conclusion thereof, request said court or said Hon. Maurice T. Dooling to instruct, charge or admonish said jury not to permit themselves to be influenced by any article, item or editorial that might have been printed in any newspaper, or that might have been read by them or called to their attention" (pp. 2484-5).

In view of these circumstances, the defendants waived any right they might have had by way of application for a new trial, to impute misconduct to the jurors, arising out of the reading of these newspaper articles.

Sheehan v. Hammond, 2 Cal. App. 371-4;

Zibbell v. S. P. Co., 160 Cal. 253;

Monaghan v. Rolling Mills Co., 81 Cal. 190;

Wood v. Moulton, 146 Cal. 317;

Doolin v. Omnibus Co., 140 Cal. 375.

III.

THE EVIDENCE CONCLUSIVELY ESTABLISHES THE GUILT OF ALL OF THE DEFENDANTS.

In its charge to the jury the lower court, among other things, said:

“But while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose or purposes alleged in the indictment, yet it is not necessary to prove that the parties ever came together and entered into any formal agreement or arrangement between themselves to effect such purpose or purposes; the combination or common design or object may be regarded as proved if the jury believe from the evidence beyond a reasonable doubt that the defendants were actually pursuing in concert the unlawful object stated in the indictment, whether acting separately or together by common or different means; providing all were leading to the same unlawful result.

* * * * *

A conspiracy can seldom be proved by direct testimony. Persons combining for the execution of a crime do not ordinarily expose themselves to public observation, and the fact of combination can, therefore, as a general rule, be established only by proof of the acts of the several parties in such combination, the relation of these acts to each other, and their tendency, by united effect, to produce the common

result. In other words, where the jury finds that the acts of the several parties charged with conspiracy are the co-ordinates of each other, and are for the consummation of the criminal purpose charged in the indictment as the object of the conspiracy, they are at liberty to find that the various parties performing these several and respective acts were engaged in a conspiracy to commit the offense, although there may be no direct evidence whatever before the jury to show that such parties ever entered into any agreement to commit such offense.

A conspiracy may be proved by showing the acts and conduct of the conspirators. It is seldom possible to establish a specific understanding by direct agreement between parties to effect or accomplish an unlawful purpose. Usually, therefore, the evidence must necessarily be circumstantial in character and it will be sufficient if it leads to the conviction that such conspiracy in fact existed. Thus if it be shown that the conspirators were apparently working to the same purpose—that is, one performing one part and another, another part, each tending to the attainment of the same object so that in the end there was apparent concert of action, whether they were acting in the immediate presence of each other or not, it would afford proof of a conspiracy to effect that object” (pp. 2279-2281).

That these instructions contained a clear and explicit exposition of the law bearing upon the subjects to which they related, is not challenged by counsel for plaintiffs in error. In fact, no criticism is made of either the whole or any part of the charge given by the court to the jury. That they correctly state the rules of law applicable to proof

of conspiracies, particularly in a case such as this, is not subject to debate.

Wharton on Criminal Law, Vol. 2 (10th Ed.),
Sec. 888, p. 1671.

Wharton on Criminal Law, Vol. 2 (11th Ed.),
Sec. 1665, p. 1822.

In

Marrash v. United States, 168 Fed. 225-229,
the court said:

“It is argued that there was no direct evidence of conspiracy, and the circumstantial evidence was insufficient to warrant a conviction. Under Section 5440 it was necessary to prove that two or more of the defendants, Selim Marrash and George Sara, for instance, conspired to defraud the United States of duties lawfully due on imported laces, and that either Marrash or Sara did enact and carry it out. It is not necessary to establish the conspiracy by direct evidence. Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine. It is enough that they have a common purpose to defraud and that they act together for that purpose.

It is not necessary that a formal agreement be proved; it is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same unlawful purpose, even though individual conspirators may do acts in furtherance of the common, unlawful design, apart from and unknown to the others. It is manifest, therefore, that in many and indeed in most cases of conspiracy a corrupt agreement is proved by circumstantial evidence. Such evidence must, of course, satisfy the jury beyond a reasonable doubt, but in this

respect there is no distinction between circumstantial and direct evidence.”

See also

Alkon v. United States, 163 Fed. 810-812;
People v. Sacramento Butchers' Ass'n., 12
 Cal. App. Rep. 471-495;
People v. Donnelly, 143 Cal. 394;
Thomas v. United States, 156 Fed. 897-910;
Davis v. United States, 107 Fed. 753;
Chadwick v. United States, 141 Fed. 225, 229-
 230.

Reading the evidence in the light of these authorities, how can it be said that the evidence does not show that the defendants were acting together understandingly to accomplish the purpose described in the indictment?

Without reiterating any of the evidence which is fresh in the mind of the court, we desire to briefly advert to some of the circumstances and facts which conclusively prove that in perpetrating the frauds alleged in the indictment the defendants were acting together pursuant to a common understanding and to effectuate the same purpose.

As to Plaintiff in Error, James B. Smith:

James B. Smith was the vice-president and active manager of the Western Fuel Company. He managed and directed its affairs and controlled its destinies. He assumed, as he was obliged to, full responsibility for the conduct and actions of his subordinates.

Shortly after the Folsom Street bunkers were acquired, the permanent decking or flooring was ripped up, putting them in the condition pictured by the evidence, so that the frauds charged with reference to incoming coal could be easily perpetrated. He knew the location of the scales-house, the position of the weigher and his resulting inability to observe operations; he knew not only the invoice weight of the various cargoes of coal discharged by the Western Fuel Company (because, in many instances, as the entries disclose, the cargoes were entered by him in the customs-house), but he likewise knew the actual weight of the cargoes loaded at Nanaimo and Northfield. He received daily reports of the quantity of coal discharged, and, at the conclusion of the removal of the cargo, knew whether it had weighed short or over, and the amount thereof. Visiting the docks daily, as he testified, intimately acquainted with the activities of all of his subordinates, and keeping himself in touch with every angle of the business done by the Western Fuel Company, he must have known of the practices indulged in to avoid the payment of duties upon imported coal, particularly in view of the shortages that occurred from time to time, representing the difference between the invoice and out-turn weights, and the greater shortage represented by the difference between the actual loading weight and out-turn weight. He kept himself daily informed as to the exact weight of the coal discharged into the compartments of the offshore

bunkers and the exact weight of the coal from time to time checked into and laden upon the barges. He knew each vessel into the bunkers of which this coal was delivered, the claimed weight of the coal thus supplied, and the overage from time to time reported as existing upon the barges. Receiving as he did, daily transcripts of the books kept by Mills, he had positive information as to the quantity of coal going into and being taken out of the barges, and when clean-ups occurred, knew not only the amount of overage but the quantity of overage in tonnage and the percentage it bore to the coal received by the barge. He knew, as everyone else knew—even the experts—that the overages shown by Mills's books and proved by the evidence, could not be accounted for other than by the existence of illegitimate and dishonest practices.

It was communicated to him that Bunker complained that the "Manchuria" was not receiving the quantity of coal claimed to have been supplied, but without avail. The overages resulting from the barges were shown up in the monthly statements, and when inventories were being prepared was the subject of conversations occurring between himself and Secretary Norcross. The value of the overages in money was contained in the annual statements prepared by President Howard and explained by him at the meetings of the stockholders. And, in a large percentage of cases, the affidavits upon which duties were refunded by the United States Govern-

ment were made by Smith, most of which, as the evidence shows, were false and unfounded.

In addition to these things, however, the evidence proved that with his consent and direction the gratuities donated to the employees and one of the officers of the Pacific Mail Steamship Company were made, and the illegal and unwarranted payments of overtime to the Government weighers were paid.

As to Plaintiff in Error, F. C. Mills:

Aside from being general manager of the Western Fuel Company and a member of its Board of Directors, directing the construction of the Folsom Street bunkers, and having knowledge of the monthly and annual statements, every fact and circumstance above narrated, knowledge of which was imputed to plaintiff in error James B. Smith, applies equally to F. C. Mills.

He was the superintendent in charge of the docks, bunkers and barges—that branch of the business of this corporation with which we are here concerned. All of the employees engaged in this branch of the service were subordinate to and controlled by him. As to him, however, the evidence showing a persistent and consistent course of conduct to accomplish the purpose stated in the indictment is more direct and more specific. We find him “howling” when barges turned out short; detailing David Powers to act as a tally clerk for the Pacific Mail Steamship Company, with in-

structions to give the Western Fuel Company the best of it; directing that coal furnished to the transports be shortweighted by overloading the tubs that were weighed and underloading those that were not weighed; refusing to pay heed or attention to the complaints of the engineers in charge of the liners coaled from the barges; directing said Powers to tend to his own business when referring to the overages on the barges; and finally, consistent with the illegal conduct proved, we find the perpetration of the fraud and its extent established by his own books.

As to Plaintiff in Error, E. H. Mayer:

That Mayer was a party to the conspiracy charged in the indictment, especially so far as duties upon imported coal were concerned, is unquestioned. He was the assistant weigher or tally clerk in charge of the operations resulting in the discharge of imported coal. It was Mayer who determined the destination of this coal after it had been weighed, and it was he who kept records, not only of the quantity of coal discharged daily, but the invoice weight, the out-turn weight, the shortage or overage, as the case might be, and the various portions of the cargo that were distributed in the bunkers and yards of the Western Fuel Company, including the pockets of the offshore bunker. It was he too who controlled the delivery of coal from the offshore bunkers to the barges, and kept records of the quantity thus discharged. It was this same plaintiff in error through whose instrumentality, direction

and command large quantities of coal were directly shoveled and dumped into the pockets of the in-shore bunker before being weighed, so that, among other things, the payment of customs duties would be evaded. It was the same defendant who interfered with the scales-rod and boasted of his actions, as he did of the shortweighing of coal due to the defective scales and the irregular link.

The activities of any one of these individuals without the assistance or consent of the others could not have reached any satisfactory conclusion. In the very nature of things, they must have acted in concert, the result of a preconceived common understanding, which had for its purpose the result portrayed in the indictment.

If Mayer and Mills are guilty, then James B. Smith must be guilty. And it is impossible to assume that subordinates would have committed the acts or indulged in the conduct established by the evidence as to the plaintiffs in error Smith and Mayer, without the knowledge, acquiescence and active participation of the superior by whom their activities were directly controlled.

IV.

**THERE WAS NO MISCONDUCT ON THE PART OF COUNSEL
FOR THE GOVERNMENT DURING THE COURSE OF THEIR
ARGUMENT.**

On page 329 of their brief, counsel for plaintiffs in error argue that counsel representing the Govern-

ment were guilty of misconduct in making the argument to the jury shown at Folios 2513-2520 and 2520-2530 of the record. An examination of the record, however, will disclose that no objection of any kind was made during the course of the argument, nor was it claimed in the court below that in using the language attributed to them, prosecuting counsel were guilty of any misconduct. It has been repeatedly held that even if objection is made to statements made during the course of an argument, unless the court is requested to instruct the jury to disregard the objectionable matter, so as to invite action on the part of the lower court, the alleged misconduct does not admit of review on writ of error or appeal.

Diggs v. U. S., 220 Fed. 556.

People v. Babcock, 160 Cal. 537.

People v. Molina, 126 Cal. 505.

People v. Shears, 133 Cal. 154.

People v. Regan, 36 Pac. 472.

State v. O'Keefe, 43 Pac. (Nev.) 918, 919.

People v. Warr, 22 Cal. App. 667.

In the case at bar not even an objection was made.

But even though the point urged could be considered, we feel satisfied that the court will reach the conclusion that no impropriety was indulged in.

In

Dunlop v. U. S., 165 U. S. 486, 41 L. Ed. 799,
the Supreme Court said:

“There is no doubt that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony and which are or may be prejudicial to the accused. In such cases, however, if the court interfere and counsel properly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.”

See also—

Chadwick v. U. S., 141 Fed. 225.

Johnson v. U. S., 154 Fed. 445.

Diggs v. United States, 220 Fed. 556.

People v. Conklin, 175 N. Y. 333,

where it is said:

“The prosecuting officer has a right to try his case in the same way and subject to the same rules as other counsel. It is only when he resorts to violent enunciations and to matters not embraced in the proofs or involved in the issues that the court may interfere.”

See also—

Holt v. U. S., 218 U. S. 245-254; 54 L. Ed. 1021-9.

People v. Burke, 18 Cal. App. 72.

People v. Ye Foo, 4 Cal. App. 742.

People v. Stein, 23 Cal. App. 108.

V.

**NO ERROR COMMITTED DURING THE CROSS-EXAMINATION
OF TIDWELL IN THE RESPECTS POINTED OUT.**

It is claimed that the court erred in sustaining the Government's objection to the following question put to Tidwell on cross-examination:

"Now, I ask you, what other matters have you in mind and which you use in that assumption other than these three instances of the 'Germanicus' and the 'Dumbarton'?" (p. 552).

The objection was that the question was not proper cross-examination. The witness was being cross-examined with reference to certain calculations and tables prepared by him, based upon invoices, entries, draw-back claims, books and records theretofore introduced in evidence. Aside from some observations made by him to which he had testified, he had no personal knowledge whatever touching the cause of the shortage of cargoes on importation.

Before the question quoted above was put to the witness he had testified that in his opinion the coal that went into the offshore bunkers had been correctly weighed, and his calculations made upon that basis, but that that assumption did not include all coal that passed over the scales, because he had information as to crooked weighing; that he had in mind the "Dumbarton" and the "Germanicus", where there was a shortage and where a settlement had been made with the Government on invoice weight (pp. 551-2).

What other matters he had in mind which created the opinion that all of the coal that went over the scales had not been weighed, was improper cross-examination. The evidence which follows emphasizes the objection. Says the witness:

“I did not prepare Table C necessarily on the assumption that all of the coal that went into the offshore bunkers went into the Folsom Street offshore bunkers. I simply treated the bunkers as bunkers according to the record” (p. 552).

Nor was any error committed in refusing to permit the following question to be put to the same witness, on cross-examination:

“Then, Mr. Tidwell, do you recall an article appearing in the ‘San Francisco Bulletin’ the day after you commenced this examination of the books and papers of the Western Fuel Company concerning these books and papers?” (p. 566).

That this was not proper cross-examination is obvious. How could the witness be affected by any article which appeared in a newspaper, unless it had been shown that the article emanated from him? The production of the newspaper article would not have proved that it originated from or that its publication was instigated by Tidwell. Especially is this true where as in this instance the record shows that Tidwell had already positively and emphatically denied that he had supplied any infor-

mation of any kind to any of the newspapers (pp. 556-7). Says Mr. Tidwell:

“I mean to be understood that I had absolutely nothing to do with the supplying of information to any newspaper, either directly, indirectly, or otherwise” (p. 557).

The subject-matter to which the question was directed, however, was thoroughly canvassed later on in the cross-examination of this witness (pp. 626-630).

VI.

NO ERROR COMMITTED IN RULING ON THE TESTIMONY OF FREUND.

During his direct examination the witness Arnold H. Freund had testified that upon one occasion he weighed a barge out short, which was evidently the result of watching the tubs very closely. The following question was then put to the witness:

“What, if anything, occurred after you had completed weighing out that barge; when did you next get an assignment to weigh drawback coal?”

A. Some time after.”

Then follows the question to which objection was made, viz.:

“How much time elapsed, if you can recall?”

To which the witness answered:

“I don’t know, but some few months as far as I can recollect. It was quite a while; I don’t recollect the date of it, but I know I didn’t get down there for some time after” (pp. 1182-3).

Preliminarily, it may be observed that the ground upon which the objection proceeded was not pointed out, the objection being:

“Mr. McCUTCHEN. We object to that. What is the inference to be drawn from that?”

The question, in any event, was proper as having a tendency to show collusion between the Western Fuel Company and the United States weigher, particularly considering the evidence introduced showing gratuities of coal and payments of alleged overtime. It was also pertinent for the purpose of showing when the witness was next engaged in weighing draw-back coal. However, the court may view this situation, no prejudicial error arose.

VII.

THE LOWER COURT COMMITTED NO ERROR DURING THE EXAMINATION OF TIDWELL AS A WITNESS FOR THE DEFENSE.

Evidently for the purpose of impeaching David G. Powers, the defendant put Tidwell upon the stand, who denied having had any conversation with Powers in which he (Tidwell) stated that in the sugar fraud cases the discharged checker and special agent in charge received the sum of \$100,000. In fact, the witness went further than that, and stated that he had not discussed the sugar case with Mr. Powers, but had discussed with him the matter of reward and had showed him the statute (pp. 2076-7). The witness was then finally asked the question:

“Have you had any correspondence with respect to reward?”

This question was so obviously improper that before counsel for the Government had an opportunity to object the court itself interposed by stating:

“This is not impeaching, Mr. Moore; this is not anything except fishing.”

The examining counsel himself realized the propriety of the court's remark by not taking an exception nor making a protest against this ruling. That Powers could not have been impeached by any correspondence passing between the witness and others, must be conceded. That defendants would have no right to impeach their own witness is equally obvious.

VIII.

NO ERROR WAS COMMITTED DURING THE EXAMINATION OF THE DEFENDANT MILLS.

During the direct examination Mills was asked the question:

“Now, Mr. Mills, the public accountant examining these books of yours, states that there is an average overrun on those barges during the entire year under investigation here of 4.88 per cent; I want to ask you whether it is possible for one of those barges to overrun 20, or 30, or 40 per cent?” (p. 2103).

The objection was that it called for the conclusion of the witness; that it was indefinite as to founda-

tion, and that it was not one which endeavored to elicit any facts from the witness (pp. 210-304).

The question was clearly objectionable upon the grounds stated. Aside from this, however, by the next question put to the witness, which was answered, the desired information was elicited (p. 2104).

It is respectfully, but earnestly, submitted that as the verdict of the jury is abundantly supported by the evidence, and the record is free from error, the judgment of the lower court should be affirmed.

Dated, San Francisco,

November 8, 1915.

MATT I. SULLIVAN,

THEO. J. ROCHE,

Special Assistants to the Attorney General.



U. S. Exhibit 4



U. S. Exhibit 5



U. S. Exhibit 9



U. S. Exhibit 13



U. S. Exhibit 16



U. S. Exhibit 17



U. S. Exhibit 18



U. S. + 159

5233.

Smith et al

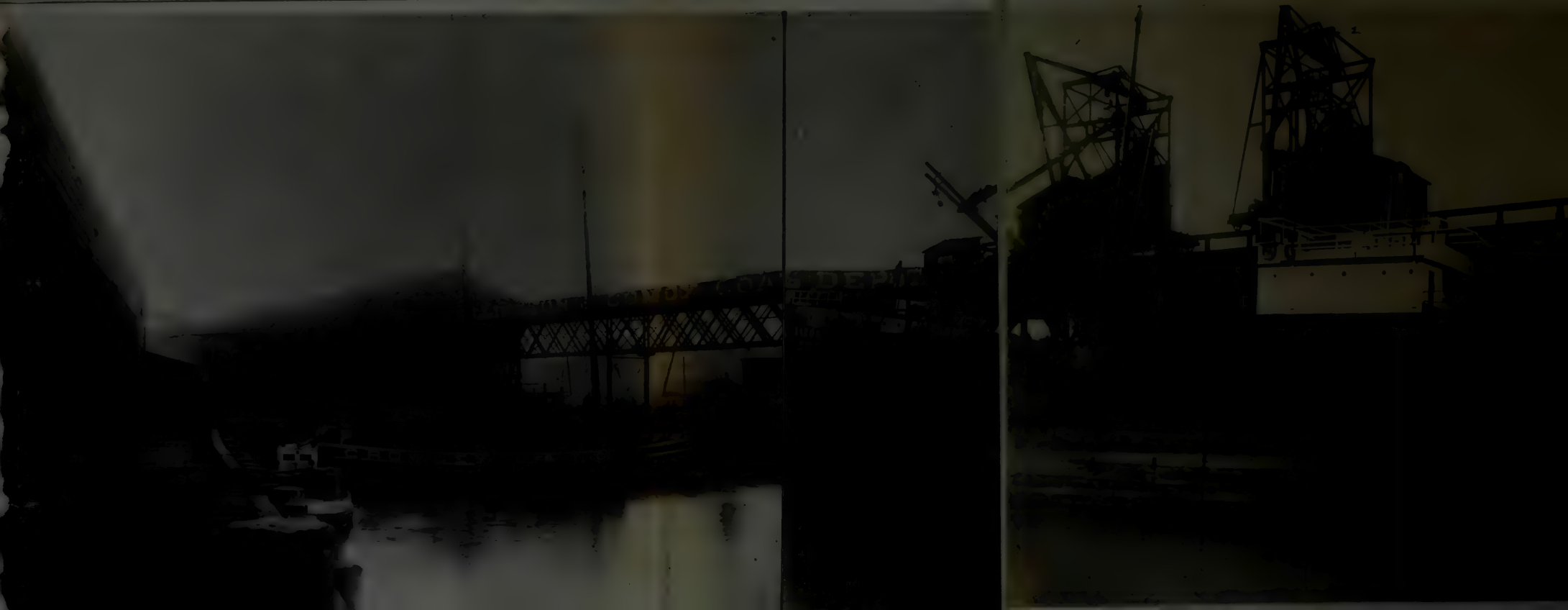
Jan 27/14

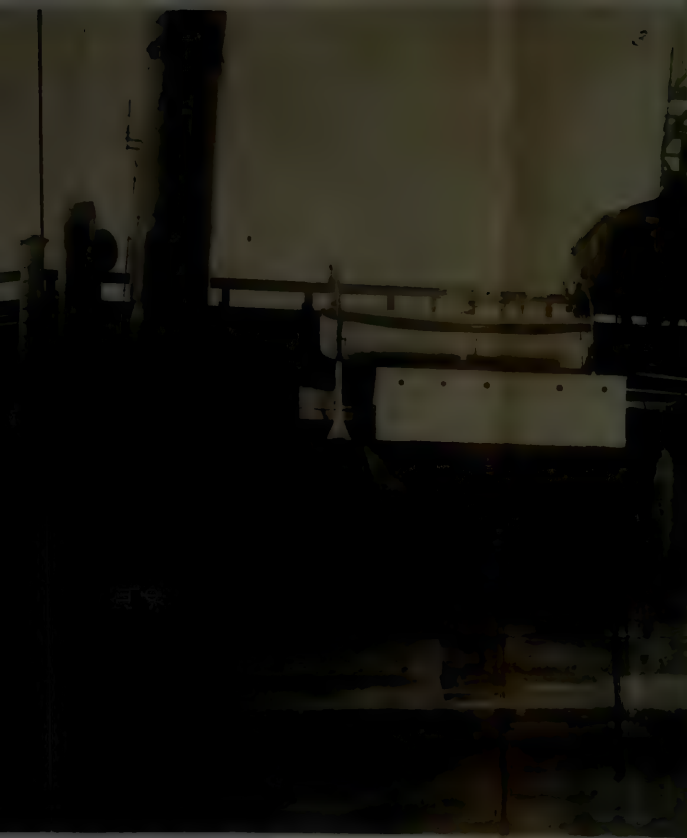
James H. Hull.

Case No. 2576
U. S. Circuit Court of Appeals
FOR THE NINTH CIRCUIT

Exhibit 159
Received Filed Nov 4, 1913
P. O. MAILING CLERK

U. S. Exhibit 159





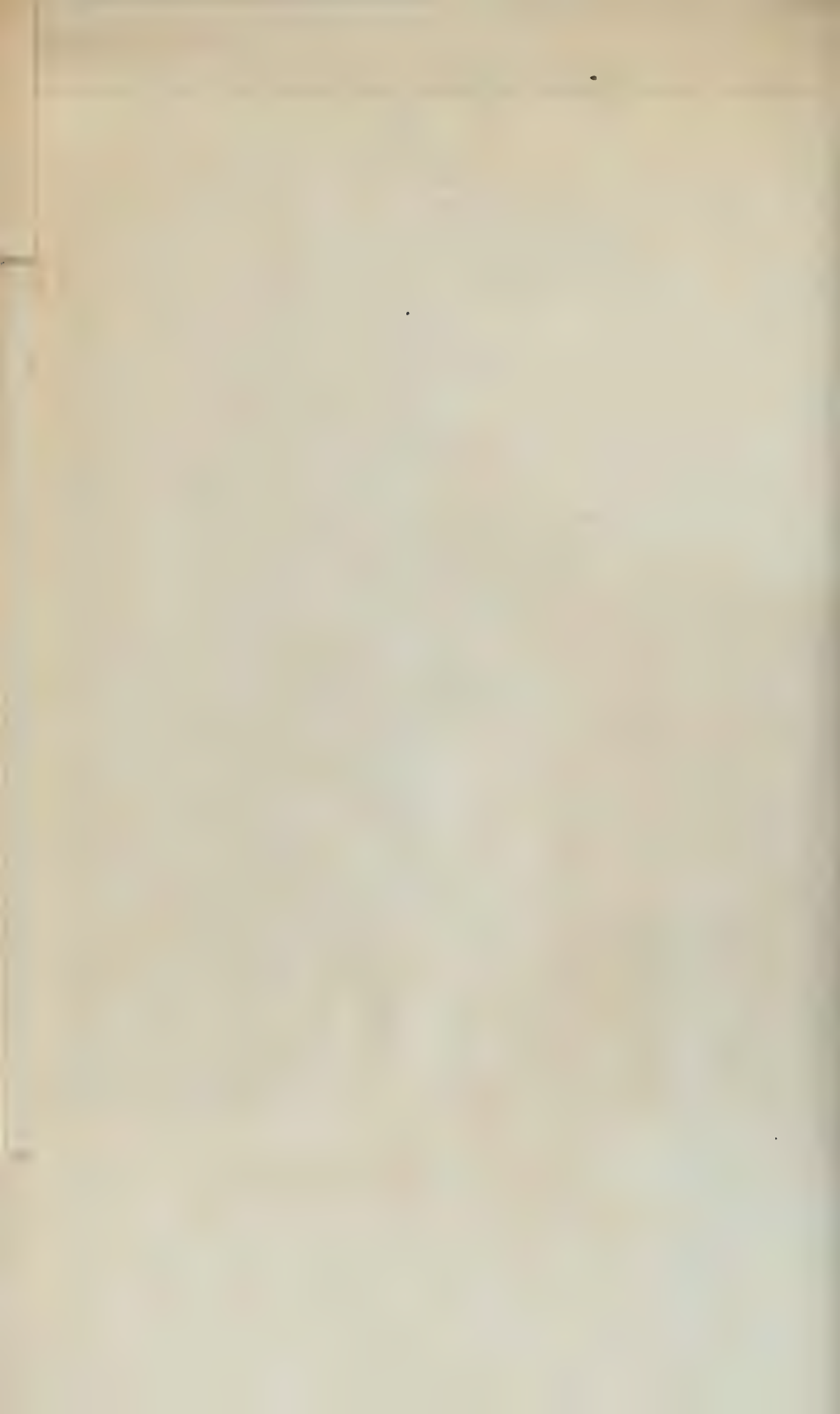
Case No. 5278
U. S. Circuit Court of Appeals
for the District of Columbia
Between John D. Rockefeller
Plaintiff
and
U. S. Population, Inc.
Defendant

5278
John D. Rockefeller
Plaintiff
and
U. S. Population, Inc.
Defendant



Case No. 1111
J. B. Craft, nurse at hospital
in 11th St. Hospital
Institution, 11th St. Hospital
Baltimore, Md.
P. O. Box 1111, Baltimore, Md.

5111
41
Baltimore, Md.
P. O. Box 1111, Baltimore, Md.





5-23-22
Exhibit D
100-100000

Case No. 123
U. S. Circuit Court of Appeals
for the Ninth Circuit
Defendant's Exhibit
Received *[Signature]*
Ex. D. Washington, D.C.

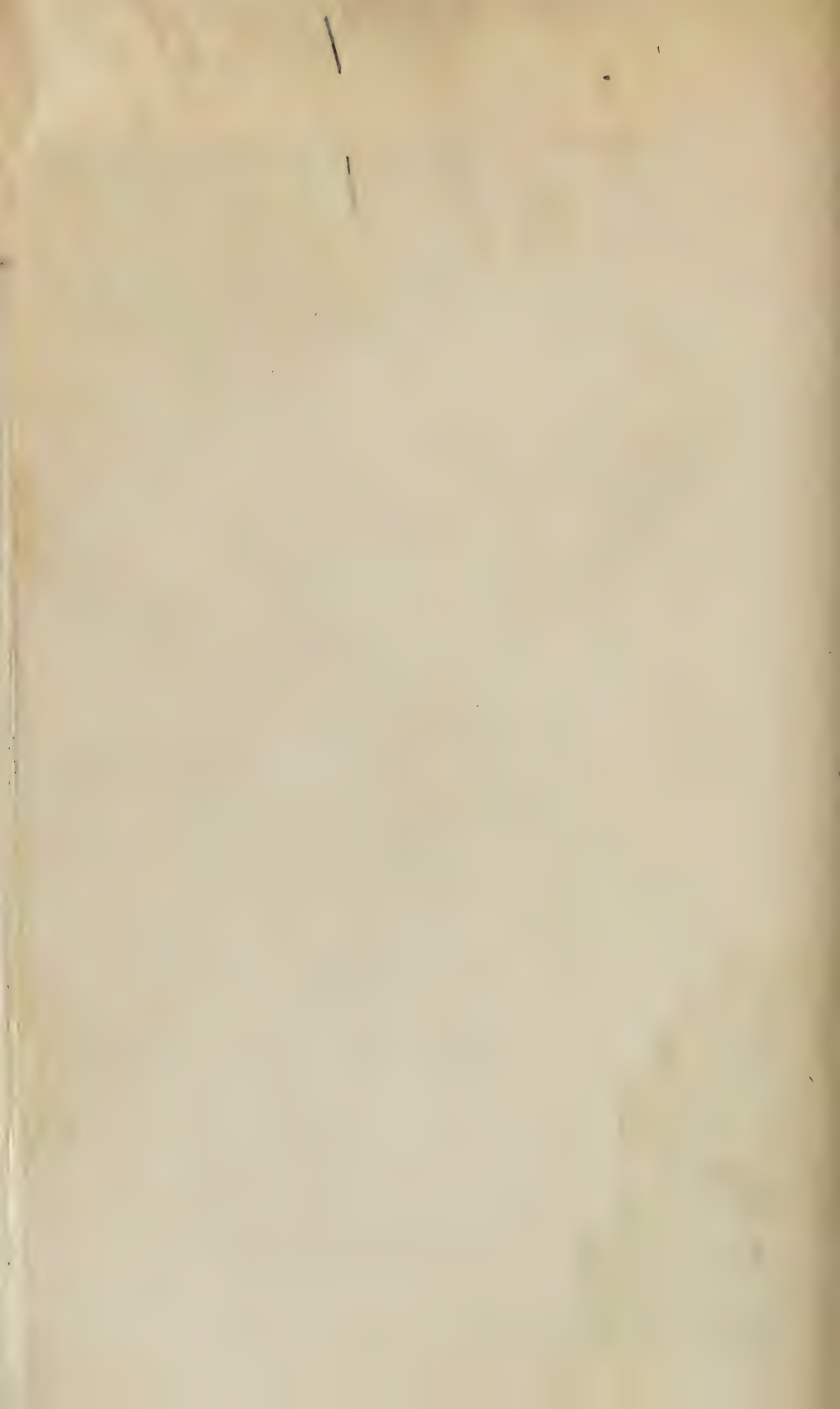
Defendant's Exhibit "D"



Defendant's Exhibit "G"



Defendant's Exhibit "H"



No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, F. C. MILLS and
E. H. MAYER,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING OF THE CAUSE.

MORRISON, DUNNE & BROBECK,
Crocker Building, San Francisco,

A. P. BLACK,
Mechanics Building, San Francisco,

STANLEY MOORE,
Balboa Building, San Francisco,
*Attorneys for Plaintiffs in Error
and Petitioners.*

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, F. C. MILLS and
E. H. MAYER,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING OF THE CAUSE.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The plaintiffs in error respectfully ask that this cause be reopened for further argument, to the end that a resubmission and a fuller consideration may be had. The plaintiffs in error are American citizens, entitled to the protection of the Federal Constitution, and they have in mind the real protection intended by the Fifth Article of the Amendments to the Constitution, enjoining that no person

shall be deprived of his liberty without due process of law. These defendants have not had due process of law. They have not had the trial according to law to which they are entitled. They have sought to point out to this court wherein the process to which they were subjected in the court below fell short of the due process which is theirs of right. The opinion of District Judge Rudkin, it is to be said with respect, curiously and singularly misses or confuses the point.

It is said in the opinion, touching the indictment:

“It must be conceded that the charge is very general, and we cannot yield our assent to the claim on the part of the Government that an indictment in cases such as this need only charge in general terms a conspiracy to defraud the United States. *Keck v. United States*, 172 U. S. 434.”

The indictment, says Judge Rudkin, was not objected to below, by way of a pleading thereto, or an objection at the trial, or a request to charge, and the plaintiffs in error were not misled to their prejudice. But if an indictment should allege one thing and the proof should go to another and different thing, with no proof of the thing alleged, we do not understand the pertinency of a suggestion that the defendants, in the trial court, made no objection to the indictment, or to the introduction of testimony, and offered no request for special instructions. The government may not prevail on one conspiracy—the conspiracy it alleges in the indictment—by attempting to prove some other

conspiracy, not alleged. Judge Rudkin proceeds to say, however, that as plaintiffs were not misled to their prejudice—unprejudiced, are we to assume, because they were charged with one thing and convicted of another?—"we think the charge," he continues, "though general in terms, and entirely lacking in particulars, was sufficient".

This, we say it with proper deference, is wholly to miss the point. If there was one thing we tried to point out to this court, it was that the charge here was not general in terms, that it was not entirely lacking in particulars. Quite to the contrary. The charge was specific, it was limited and carefully identified by particulars. And we invoked the rule that the government was held to the specific conspiracy alleged, to the particulars of the fraud set forth as descriptive of such conspiracy, and that such descriptive matter "must be proved as laid" (*Potter v. U. S.*, 155 U. S. 438, 445). This rule was carefully stated by us at pages 109-113 of our brief, under the heading: "Authorities as to particularity of allegation"; and the authorities were not simply cited by us, they were quoted from. There should not have been any oversight or confusion or misunderstanding, and yet, as must be apparent from the opinion as just noted, this is just what has happened. We took this indictment and examined it, and analyzed it, in our brief, at pages 14-20, and what did we show, and what does that indictment reveal?

The charge made is not, as Judge Rudkin mistakenly assumes, "general in terms and entirely

lacking in particulars"; not by any means. It is specific in terms, and identified by descriptive particularity. It charges the defendants with conspiring to defraud the United States—not in general terms, however, but, to use its own words, "in the manner following, that is to say:"

What is this descriptive particularity? We went over that indictment, word for word, industriously italicising and commenting upon the items of particularity. See pages 14, 15, 16, and 17, of our brief. And we made it clear—the indictment made it clear for us, we invite the closest scrutiny of the point, that the descriptive particularity of the fraud which the defendants are charged with conspiring to commit—whether in the importation at the dock or in the deliveries from barge to steamship—was the manipulation of the scales used in the weighing of dutiable or drawback coal, "to the end that said *scales* should record the *weights* of said coal desired by the defendants, and not the *true weights* of the coal *placed thereon*". Judge Rudkin's opinion concedes, and upon the authority of the *Keck* case in the Supreme Court of the United States (172 U. S. 434), that a charge of conspiracy to defraud the United States, couched in general terms, is insufficient. But if the particularity, descriptive of the conspiracy alleged here, and giving it character and identity, had been undue, if the indictment had been unnecessarily descriptive, "even the unnecessary description must be proved as laid"—as the Supreme Court of the

United States admonishes us in *Potter v. U. S.*, 155 U. S. 438, 445.

“Where a particular fact or circumstance is alleged as constituting or forming a part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proofs adduced to establish the crime; * * * in other words, where the allegation is descriptive of the offense, the guilt of defendant must be found, *if at all*, upon the ground alleged in the information or indictment.”

Randle v. State, 12 Tex. Cr. App. 251, Brief for Plaintiffs in Error, pp. 112-113.

The opinion of Judge Rudkin appreciates the approximative and inherently inexact nature of the process of weighing coal, whether imported coal at the track scales on the dock, or drawback coal on the barge scales. We quote from the opinion:

“The coal passed from the hoppers into cars on these tracks and the cars when loaded were drawn onto the scales by electric power and weighed by a government weigher, the weights being taken by the weigher and also by a representative of the Western Fuel Company, usually the plaintiff in error Mayer. As soon as the cars were weighed they were taken to the different bunkers or to the yards and unloaded as Mayer might direct. In the coaling of the vessels of the Pacific Mail Steamship Company and others the coal was laden on barges from the off shore bunkers and discharged from the barges into the ship’s bunkers by means of buckets having a capacity of half a ton or upwards. The government weigher was supposed to weigh one bucket in

fifteen, or a round of four buckets in sixty, and the remainder of the buckets were then averaged up with the buckets thus weighed for the purpose of ascertaining the entire quantity of coal discharged into the vessel. The weights taken by the government weigher were also taken by a representative of the Steamship Company and upon these weights the drawback was paid to such vessels as were entitled to claim a drawback under the law. Up to this point there is little or no conflict in the testimony."

Judge Rudkin proceeds:

"It must not be understood, however, that the results obtained are anything more than *approximate*. The parties were dealing *with a base commodity where strictly accurate weights were not taken or required*. The coal was wet down from time to time to lay the dust or to prevent spontaneous combustion and was at all times exposed to the elements. The difference between the invoice weights and the out turn weights indicates but little in view of the fact that in many instances the coal was not actually weighed at the foreign port. In a majority of cases the weight was merely estimated by the ship's scale or by the draught of the ship. How accurate this is we do not know; but evidently *it is only an approximation*. The fact that a number of tons or a certain percentage was added to the weight thus ascertained does not remove the element of uncertainty. It also appears that the import coal discharged from vessels was weighed on a rising beam. Of course if the weights were accurately taken the difference between a weight taken on a rising beam and a weight taken on an even beam would be slight; *but much would depend on the care and skill of the operator*. On the other hand, in the discharge

of coal from barges to vessels *the shovellers on the barges had more time to fill the buckets weighed than those which were not weighed by reason of the delay incident to the weighing, and naturally the former would weigh heavier than the latter.* If there was nothing in the case beyond this *we would have no hesitation in declaring that the government failed to make a case for the jury,* and it is upon this claim that the principal assignment of error is based. For whether the discrepancy in the weights was caused by the elements; by flooding the coal with water; by incompetence or negligence on the part of the government weighers, or through the adoption of a faulty system, the plaintiffs in error are not answerable criminally *unless they took some part in bringing these things about."*

We take this language of the opinion as an acceptance of the positions which we maintained, on full discussion, in our brief, and which were summarized by us at pages 49-50, in these words:

"It is now submitted:

"(1) The existence of an overage, or overrun, of the coal in stock, in excess of the custom house weights, by 2.8 per cent, so far from being a fact 'which excludes every other hypothesis but that of guilt' (Union Pacific Coal Co. against United States, 173 Fed. p. 740), was a normal condition, inherent in the business, 'as consistent with innocence as with guilt' (Union Pacific Coal Company against United States, *supra*), consistent, indeed, with no other interpretation but that of innocence.

"(2) The existence of a difference, or net shortage, as between the invoice weights and the custom house weights, by less than 1%, so far from being a fact 'which excludes every other hypothesis but that of guilt', was a normal

condition, inherent in the business, 'as consistent with innocence as with guilt', consistent, indeed, with no other interpretation but that of innocence.

"It will not be said, then, that James B. Smith, or his co-defendants, were in a conspiracy to cheat the government out of import duties, or out of drawbacks, because there was an overrun in the coal stock, or a want of conformity between the invoice weights and the custom house weights; or because James B. Smith, or his co-defendants, knew, what every custom house officer knew, what every coal importer knew, that coal in stock did overrun, and that custom house weights did not coincide accurately with invoice weights."

Now, then, what happens with the opinion? It proceeds to glance at the testimony. It overlooks completely the settled rule, already quoted, that

"where a particular fact or circumstance is alleged as constituting or forming a part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proofs adduced to establish the crime";

and goes on to associate and confound circumstances forming part of the descriptive identity of the offense charged, with circumstances not alleged at all in the indictment. That is to say, it refers to the smuggling of coal into the bunkers *without being weighed*, to the condition, also, of the *unweighed* buckets delivered from the barges to the steamships, and to the records kept by the defendant Mills of such deliveries—all this, a matter of unweighed coal in which the fraudulent manipulation of the scales in respect to the coal placed

thereon, had no lot or part whatever; and in the same connection, and as part of the same immediate context, it refers to the exposed rod incident and to the bent link incident as being circumstances which “caused *inaccurate weights* to be taken”; and the conclusion expressed is, that the United States was defrauded, to an extent at least, “by reason of the fact that a portion of the imported coal *never reached the scales, was never weighed*, and that no duty was paid thereon”, and, second, the United States was defrauded, to some extent, “by reason of the fact that it paid drawbacks to steamers entitled to claim drawbacks for coal, in excess of the quantity actually delivered to them”; although it is not pretended in any quarter that, in respect to the drawback steamers, there was any fraudulent manipulation of the scales in respect to the weight of the coal placed thereon. This is a curious state of affairs, we say this with great respect; it is a curious misconception, it must have been an oversight, on the part of the writer of this opinion. The settled rule of law limited this court, in examining the sufficiency of the evidence, to those circumstances of descriptive particularity alleged in the indictment; and the only particulars alleged in the indictment, and they were alleged over and over again, with tiresome iteration, were the circumstances descriptive of the fraudulent weighing of coal which had been placed upon manipulated scales. The smuggling of unweighed coal into the bunkers, or the delivery of unweighed coal from the barges, or any insufficient delivery of contract coal, unweighed, from barge to steam-

ship, were beside the question, were not alleged in the indictment—that indictment turned on weighed coal, on coal that was placed upon scales, not upon unweighed coal at all. The indictment is an obvious reflection, as we pointed out at pages 17, 18 and 19 of our brief, of the pleading in the *Heike* case, 192 Fed. 83, 91, and yet this opinion, without apparent appreciation of a settled rule of law, and of a distinction fundamental to the case, confuses weighed coal and unweighed coal, as if it was all equally responsive to the indictment, and assumes to find, in this fallacious aggregation of incongruous and disparate elements, a basis for the affirmance of this judgment.

There were three incidents in the case which had to do with weighed coal, with coal “placed on the scales”—the bent link incident, the exposed rod incident, the scales block incident. These three incidents happened in 1905, eight years before this indictment was found, and it is well enough to note, they happened on the Mission Street Dock, not upon the Folsom Street Dock, where, as the opinion recognizes, the principal operations of the Western Fuel Company were conducted. We appeal at once to the mind and conscience of the writer of this opinion—if he had observed the rule of law, appropriate to this indictment, and had limited himself to these three incidents, could he have said, as a magistrate administering due process of law, that such things, together or separately, were any evidence worthy the name, let alone satisfactory evidence, that Mr. Smith, Mr. Mills and Mr. Mayer had entered into a conspiracy, and, for three years

next before the filing of this indictment had been engaged in carrying out a conspiracy, to defraud the United States by the manipulation of the scales on which dutiable and drawback coal had been placed by them to be weighed? The scales block incident was so completely exploded (see our brief, pages 81-96), that the opinion of Judge Rudkin does not mention it; but the opinion does speak, in a fugitive way, of the exposed rod and the bent link. This is the language:

“There was further testimony tending to show that Mayer pressed his foot or leg against the scale rod from time to time, thus preventing the Government Weigher from taking accurate weights, and that he was cognizant of the existence of a bent link between two of the cars, which likewise caused inaccurate weights to be taken.”

This is the beginning, middle and end of the opinion to this point. The exposed rod incident was fully ventilated in our brief at pages 50-74. It did not take 24 pages, however, to dispose of the incident. That was the first discussion in our brief of the testimony of David Powers, and the history and character of that witness took some space. The net result of his testimony was, that he saw Mayer, with his foot against the exposed rod, several times in 1905, at Mission Street Dock; and he identifies the year and the dock by reference to the ship “Dumbarden”. The government officer Freund, as we show very fully, fixes the time of this incident “before the fire of 1906” (our brief, p. 72).

“If I remember,” says Mr. Freund, “when I worked there the first few times the rod was

exposed; then I was away for a time, and when I came back *I found they had boxed it in*. I am acquainted with the defendant, Eddie Mayer, and have known him since I have been in the service. I recall *an occasion* when he was located in the scales-house at the Mission Street dock and permitted his feet to come in contact with that *exposed* rod. I don't know exactly when that occurred, but I think it was just *before the fire of 1906*" (our brief, p. 72).

Freund tells of rubbing the rod with a piece of chalk, and afterwards of noticing some chalk mark on Mayer's trousers—that is the whole incident:

“‘Eddie,’ I says, ‘where did you get the chalk on your pants?’ And he says, ‘Darned if I know’. ‘Well’, I says, ‘you want to keep your leg away from the rod and cut out your monkey business’, and he laughed and called me a lobster, or something, I have forgotten which, *and I simply told him that; that was the end of it, I never bothered with him after*” (our brief, p. 72).

As Freund says, “that was the end of it, I never bothered with him after”. The rod was boxed in, and it had been boxed in for eight years when this indictment was returned.

The bent link incident is fully considered in our brief at pages 74-81. It also happened at Mission Street Dock, and in 1905 also, it was a mere accident to the coupling of the coal cars, in the wear and tear of the business, and as soon as attention was called to it, as the government witness Freund tells us, “Mr. Mills or Mr. Smith, I don't recol-

lect which, immediately ordered that a longer link be put in''. We quote the following summary from our brief, at pages 96-97, and, once more, in the most straightforward and respectful way, we put it directly to the judicial conscience of the learned writer of the opinion, if that summary can be fairly gainsaid:

“There are, then, these three incidents in the record: the exposed rod incident, the bent link incident, and the scale-block incident. And this is the evidence upon which the government attempted to sustain the charge of a *specific conspiracy*, notified to these defendants in the indictment, a *conspiracy* for the manipulation of the scales used in the weighing of dutiable coal, ‘to the end that *said scales should record* the weights of said coal desired by the defendants, and not the true weight of *the coal placed thereon*’. The exposed rod incident was back in 1905. It was at one of the docks only, and that was Mission Street dock. It was a matter pertaining to the defendant Mayer alone, Mr. James B. Smith and Mr. Mills had no connection with it, it was a thing between Mr. Freund and Mayer, and after Freund had spoken of it, the exposed rod was boxed in. The bent link was also an occurrence of 1905, and upon one dock only. It seems to have come about in the partial derailment of the weighing cars, more or less unavoidable, and indeed, the supply of new links was part of the duty of the Fuel Company’s machinist and his helper. Mr. Smith and Mr. Mills are mentioned in connection with this incident, but to this extent only, that when the matter was brought to their attention, they promptly saw to it that the difficulty was corrected. The scale-block incident, with the settling down of the platform, was also an incident of 1905, at one of the docks

only, and it is fully explained, without blame upon anyone" (our brief, pp. 96-97).

Mayer, alone, in any event, and from any point of view, could not have been guilty of conspiracy—conspiracy means partners. James B. Smith and F. C. Mills, to use the words of Judge Rudkin, "are not answerable criminally unless they took some part in bringing these things about". If any part they took, it was not in bringing these things about; it was in correcting and repairing them, and at the time and on the spot.

It is said by Judge Rudkin, after explaining the approximative character of the coal business, so far as the weighing of such a commodity is concerned, and the inherent impracticability of getting accurate weights:

"If there was nothing in the case beyond this, we would have no hesitation in declaring that the government failed to make a case for the jury, and it is upon this claim that the principal assignment of error is based. For whether the discrepancy in the weights was caused by the elements, by flooding the coal with water, by incompetence or negligence on the part of the government weighers, or through the adoption of a faulty system, the plaintiffs in error are not answerable criminally unless they took some part in bringing these things about."

What is there in the case, we ask, beyond this, and within the allegations of this indictment, when properly understood, except these three incidents at the Mission Street Dock, in 1905, and is it not

clear that this court should have "no hesitation in declaring that the government failed to make a case for the jury".

In the indiscriminating association of circumstances in this opinion, of particulars relative to the weighing of coal with particulars relative to coal that was never placed on the scales, reference is made—in manifest error, we must be pardoned for speaking frankly—to the smuggling of unweighed coal into the bunkers, and also to the discharge of unweighed buckets from the barges into the steamships, and to the records kept by Mills of the barge deliveries. We give the language of Judge Rudkin, and it will be seen at once that he is dealing with unweighed coal.

"There was direct and positive testimony," he says, "tending to show that at the Folsom Street docks, coal was shoveled into the bunkers from the tracks *without being weighed*; that coal was run from the chutes or hoppers into the bunkers *without being weighed*; and that train loads of coal were passed over the scales and dumped into the bunkers, *without being weighed*".

A reference is also made, in an earlier part of the opinion, to the removal of the old permanent planking at the docks, and to the substitution of temporary planking, but it does not seem to have been noticed that this was done in the reconstruction, at great expense, of the bunkers, in enlargement of storage capacity, and that it was the duty of the employes, when ships were discharging, to

put down this temporary planking (our brief, pp. 122, 123); and this from the government witnesses themselves; yet, strangely enough, the opinion remarks that

“this temporary planking could be moved and replaced by the employes of the company from time to time, *but for what purpose does not appear*”.

The language of the opinion, pertaining to the barge deliveries, is as follows:

“There was also testimony tending to show that in discharging coal from the barges into the vessels of the Pacific Mail Steamship Company, the buckets weighed were filled to overflowing, while the *unweighed* buckets were little more than two-thirds full; there was testimony tending to show that this practice was pursued continuously and uninterruptedly.”

The record shows, by actual experiment in the presence of Judge Dooling and the jury, that buckets only two-thirds full, would not “trip”, and it is said by Judge Rudkin himself, at another place in the opinion, and in a spirit of fairness which we acknowledge and appreciate:

“In the discharge of coal from barges to vessels, the shovelers on the barges had more time to fill the buckets *weighed*, than those which were *not weighed* by reason of the delay incident to the weighing, and naturally the former would weigh heavier than the latter.”

Certainly, little short of this could be said, in view of the testimony of the government witness, Edward Powers:

“Q. To what do you attribute the fact, Mr. Powers, if it be a fact, that the tubs that are weighed have some more coal in them than the tubs which are not weighed?

“A. *Well, I attribute that to the fact that they have more time to put it in*” (our brief, p. 196).

It is said, however, in the opinion,

“that instructions to that effect were given on at least one occasion by the plaintiff in error Mills in relation to another vessel”.

But this has no reference to the transactions or to the vessels in evidence. It refers to an incidental remark made by Edward Powers, not to the Pacific Mail Dock, at all, but to the transport dock, and there was no evidence in the case touching any delivery from a barge into a transport vessel. Says Powers:

“On the transport dock—Mr. Mills told me to underload the tubs; on the transport dock, *not on the Pacific Mail Dock*” (our brief, p. 206).

To the contrary, Powers says, touching the Pacific Mail Steamships, that Mr. Mills told him not to have any trouble over there, in respect to loading the tubs (our brief, p. 204). And he says further, that he never received any instructions from Mr. Smith or Mr. Mills to overload or underload tubs, and he repeats that Mr. Mills told him not to have any trouble over there in loading the tubs (our brief, p. 202).

The opinion next refers to

“the books and records kept by Mills,” as frequently showing “a great disparity between the

quantity of coal laden on the barges and the quantity of coal discharged therefrom; that reports showing these discrepancies were made daily to the plaintiff in error Smith, and to the Western Fuel Company, and that each and every one of the plaintiffs in error were fully cognizant of these discrepancies, and it is not going too far to say that they were equally cognizant of the causes that produced them”.

“The books and records kept by Mills”, means simply a rough blotter kept by Mills, with no pretensions to accuracy, and which misled the government agent Tidwell himself into some serious blunders of computation. This is fully explained in our brief at pages 170-181. Mr. J. B. Smith never examined these dock books of Mills, never looked at them except cursorily, and would not have been surprised if he had found overruns, for overruns, as Judge Rudkin clearly points out, are inherent in the business. In fairness to Mr. Smith, and to repel any inference unjust to him which might be drawn from the language of the opinion, we quote his testimony as given at pages 181-2 of our brief:

“Mr. Mills, as well as all the other employees, send reports to my office. I receive reports from every department of the business. From six to eight such reports are turned into my office every day. I do not necessarily look at Mr. Mills’ reports daily. I know that they are there if I wish to refer to them at any time. I have certainly, in looking at them, observed overruns in connection with the barges. The overruns showed upon these reports certainly did not excite any surprise or suspicion in my

mind, because, when we first commenced the business of the Western Fuel Company, Mr. Mills explained the method in which they handled the coal in the barge department. I also knew that the weights going into the barges were not accurate. I knew that the barges were merely floating vessels used for the storage of coal and, therefore, we were not particularly interested in keeping accurate weights of the coal laden upon the barges. *All we desired was the approximate weights, because we knew that finally the coal in the barges would find a weight in connection with its discharge.* It could not really have made any particular difference to us whether the coal was weighed at all when it went into the barges. All that coal was the property of the Western Fuel Company. Nobody else had any interest in it. It was not any more important to us to have accurate weights of that coal than it would be to have accurate weights of the coal in a particular bunker or yard belonging to the corporation. *The only thing, therefore that really indicated the overrun to me was the annual stock-taking account.* * * * I never in my life examined the so-called 'Mills' dock books or diaries' covering the years 1906 to 1912. In answer to the question whether it is possible I never looked at those books at all to ascertain the overage or the shortage, or the quantity of coal charged up against a barge, etc., I would say that, as I explained in my direct examination, *we were not interested and I was not interested in the quantity of coal that went into the barges; all that I cared about was the final weight that was charged against the vessels or people that were receiving coal from our barges.* The barges were simply floating storships with scales adjusted on them to ascertain *the delivered weight* the same as the platform scales down on the street to as-

certain the quantity of coal delivered out from the yard. I suppose I knew Mr. Mills was keeping those books because they were there on his desk, but I never examined into their contents nor was I interested in their contents. They were his own method of keeping account down there to his own satisfaction. As manager I was, of course, interested in the manner in which every department was run, but it was not necessary for me to, and I did not, ask Mr. Mills why he made entries in those books. *His purpose, as I understood it, was only to keep a general idea of the amount of floating storage we had* so as to be able to know from day to day what position we were in to meet the requirements of steamers calling for coal."

We have so far noticed these matters, not germane to the descriptive particulars of the indictment, by way of answer to some of the statements contained in the opinion. We have discussed these extraneous matters *in extenso*, in our brief, at pages 115-290, not because they fell properly within the purview of the indictment, but in exoneration of these defendants from any imputation that they were parties to a conspiracy to defraud the United States, whether alleged or not. We did this, as we say explicitly in our brief (p. 115) "regardless of the offense charged in the indictment, and with the full realization that the matter now to be propounded lies outside of any question made by this record for decision here". We cannot but believe that if a fuller consideration could have been given to the record as we have reviewed it, some of the statements in this opinion would not have been

made. We trust that, upon the only issue tendered by the indictment, we have made clear the error and oversight of the opinion. We now submit it as the proper course for this court, to order a re-argument.

The unfair and abhorrent practices on the part of some jurors in this case, were exposed on motion for new trial. The matter is fully presented in our brief at pages 290-329. The wrong done "could not be corrected by assignment of error for anything done in the course of the trial" (*Atlantic Coast Line Company v. Thompson*, 211 Fed. 889, 892). It was, as we have shown, upon the facts themselves and upon the decisions of the courts, including the highest court of the land, clear error for the trial judge, to deny a new trial in the circumstances. We call attention to the discussion of the affidavits of the jurors, at pages 294-307 of our brief, and we ask this court if the case is not one of "very plain circumstances indeed". We refer, now, as we did in the brief (pages 309, 314), to the language of *Mattox v. United States*, 146 U. S. 140, 149, 150; to the case of *Woodward v. Leavitt*, 107 Mass. 453, found at pages 315-316 of our brief; and to the case in this state of *Kimic v. Railway Co.*, 156 Cal. 397, quoted by us at page 317 of our brief. When the opinion of Judge Rudkin speaks of "very plain circumstances indeed", we beg to call attention to our discussion of the affidavits, and to the following language from *Meyer v. Cadwallader*, 48 Fed. 32, 36:

“That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial, is a proposition so plain that it would be a sheer waste of time to discuss it.”

We also call attention to *Morse v. Montana*, 105 Fed. 345, 346, 347, 348, conveniently excerpted at pages 322-326 of our brief; to *Callahan v. Railway Company*, ^{Fed} 158 Cal. 994, 995, found at pages 326-7 of our brief, and to *People v. Loung*, 159 Cal. 526, 527, 528, found at pages 327-9 of our brief. As Mr. Justice Clifford said in the *Callahan* case:

“Jurors must be kept free from all possible influence. When exposed thereto, it will not do to inquire into the probability of the extent of the influences, and their effect upon the verdict. There is no safety, except in setting aside the verdict in a case where acts and conduct are such that could have influenced the verdict.”

And again:

“It must be understood,” citing the *Mattox* case from the Supreme Court of the United States, “that no verdict should be permitted to stand, against which, from established facts, the slightest inference rests that it bears the taint of improper influence exerted by or in behalf of the party in whose favor it is returned.”

We have shown from the affidavits, what the circumstances were—they were “very plain indeed”, and we point out the uncontradicted evidence which an analysis of the affidavits has disclosed. Such a

showing cannot be brushed aside or disposed of by some general phrase. As the Supreme Court of California said, through Mr. Justice Van Fleet, in *People v. Leary*, 105 Cal. 490, dealing with the precise wrongdoing complained of here in respect to the jury,

“if the matter be such as would, from its character, or the manner or connection in which it is stated, be calculated to prejudice or injuriously affect the minds of the jury, a presumption of improper influence arises, and a new trial will be granted, without requiring defendant to show that harm has in fact been done his cause”.

The right to apply for a rehearing in this court implies that at some time or other the occasion must arise when a rehearing should be granted. Otherwise, an application for a rehearing would be an empty form. This is a case which must appeal to the court as one to be reopened and reargued. The opinion in the case has misconceived the case and the point of the appeal; the error must, on further consideration, be apparent to the members of the court, including the writer of the opinion himself. We respectfully ask that the cause be reheard, and that ample time be afforded counsel for the full discussion, in open court, of the facts of this case, and of the law and the decisions by which its final disposition should be ruled. We trust that nothing contained in this petition will carry the

implication of any abatement from the high respect in which we hold the members of this court.

Dated, San Francisco,
April 10, 1916.

MORRISON, DUNNE & BROBECK,
A. P. BLACK,
STANLEY MOORE,
*Attorneys for Plaintiffs in Error
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

P. F. DUNNE,
*Of Counsel for Plaintiffs in Error
and Petitioners.*

No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, ET AL.,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING.

SIDNEY V. SMITH,

Amicus Curiae.

Filed this 22 day of April, 1916.

FRANK D. MONCKTON, Clerk.

By

Filed

Deputy Clerk.

No. 2576.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, ET AL.,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING.

Moved by a deep conviction that an irreparable wrong is about to be worked upon at least one of the plaintiffs in error, the undersigned, as a friend of the court, ventures, at the risk of over-straining its patience, to offer what follows in support of the petition for a rehearing.

The opinion rendered herein conveys the impression that, if the case had been tried by this court sitting without a jury, the result would have been an acquittal. The court recognizes that the difference between the invoice and the out-turn weights indicates but little, since it might be accounted for

by the difference between the methods of weighing or estimating at the loading ports and the method of weighing here, or by the difference between a weight taken on a rising beam and a weight taken on an even beam, which again would largely depend on the care and skill of the operator of the scale.

The court also recognizes that the discrepancy between the amounts shown by Mills' record to have been laden on the barges and the amounts shown by the weighing to have been delivered to the Pacific Mail Steamship Company, might well be accounted for by the system of average bucket weighing on the barges, which afforded room for error owing to the fact that the shovelers had more time to fill the buckets which were weighed than those which were not weighed by reason of the delay incident to the weighing, and that naturally the former would weigh heavier than the latter.

The court also recognizes that if any discrepancies of weights were caused, as they may well have been caused, by the elements, by flooding the coal with water, by incompetence or negligence on the part of the government weighers, or through the adoption of a faulty system, the plaintiffs in error are not answerable criminally, unless they took some part in bringing these things about.

Having come to these fundamental conclusions as to the main features of the case, it is highly improbable that, if this court had tried the case, it would have been led by the testimony to hold that the

plaintiffs in error conspired to bring any of these things about. It would, in all probability, have given but little weight to the testimony coming from discharged and irresponsible servants of the Company, that Mayer upon some occasions years ago put his foot against the rod; that, under the eyes of the government weighers and inspectors, coal was systematically diverted from the scales; that a bent link between two coal cars, also years ago, prevented a correct weighing of two cargoes. And, being confronted with the fact, as was the trial judge, that buckets not properly filled could not be tripped without tearing the lifting appliances on the barges to pieces, this court would almost certainly have rejected the stories of those witnesses who swore to a condition of things in regard to the bucket filling which was simply impossible.

But the court finds in the record some competent evidence tending to support all these charges of improper conduct on the bunkers and barges and to show that the United States was thereby defrauded, and concludes that the verdict of the jury, so far as it was based on this testimony, cannot be reviewed on appeal. For the purposes of this argument only it may be admitted that the jury was justified in finding that fraud was committed both in the weighing of incoming coal and the weighing of the coal on which drawbacks were paid to the Pacific Mail, or rather, that that finding cannot be here reviewed.

But the court goes further than this, and holds that there was sufficient testimony to warrant the

jury in finding that these frauds were brought about by the wrongful concerted action of the plaintiffs in error and others.

As far as James B. Smith is concerned this conclusion of the court must rest upon the proposition, that there was either direct evidence showing his knowledge of the frauds, or some evidence warranting the jury in *inferring* that he knew of the frauds, because, as there was no direct evidence of a conspiracy, the jury could only find a conspiracy in knowledge brought home to Smith of the fraudulent acts.

In regard to the weighing of incoming coal, by what scintilla of evidence, by what process of reasoning or even of unauthorized guessing, can knowledge or notice of or responsibility for any fraudulent acts be imputed to him? Certainly not by any syllable that dropped from any single witness, or by any document appearing in the evidence. Assuredly not by reason of the knowledge, which must be attributed to him, of the difference between the invoice and the out-turn weights, because this difference, as this court finds, indicated nothing, was in accordance with the experience of every importer of coal to this port, and was less in percentage than similar differences experienced by the other importers. If there were nothing in the case but this evidence of occasional improper acts known, done or directed by Mayer, which, taken all together, probably had but a microscopic effect upon the total weights, and with which Smith is by the evidence

in no way connected, this court undoubtedly would hold that the government had made no case.

And such a conclusion would be quite in agreement with the probabilities. During the period covered by this case the Western Fuel Company paid to the government in duties \$1,120,553.97 and received a refund of \$10,788.58. It is simply inconceivable, that the manager of a large business corporation should have conspired with a tally clerk on the wharf to save for his company this paltry one per cent on the low duty to which coal was subject.

But the court finds that there was testimony tending to show that in discharging coal from the barges into the vessels of the Pacific Mail Steamship Company the buckets weighed were filled to overflowing while the unweighed buckets were little more than two-thirds full; that this practice was pursued continuously and uninterruptedly; that instructions to that effect were given *on at least one occasion* by Mills in relation to another vessel; that the books and records kept by Mills frequently showed a great disparity between the quantity of coal laden on the barges and the quantity of coal discharged therefrom; and that reports showing these discrepancies were made daily to James B. Smith; from all of which the court deduces the conclusion, that there was sufficient evidence to warrant the jury in finding that every one of the

plaintiffs in error was fully cognizant of the discrepancies between the quantity laden on the barges and the quantity discharged therefrom, and of the causes that produced them.

If this theory of the effect of the evidence be correct, it must lead to the remarkable and indeed incredible conclusion that, while the government was defrauded to the extent of \$17,495.24 in drawbacks wrongly paid to the Mail Company (U. S. Exhibit 125 C, Vol. 8, p. 2813, and U. S. Exhibit 130, Vol. 8, p. 2866) the Mail Company was defrauded to the extent of \$300,000 (p. 497), the value of coal for which it paid the Fuel Company but which it never received. As even in the light thrown upon the transaction by the evidence given on the trial of this case, the Mail Company has never complained of its treatment by the Fuel Company, since on the trial its officers and servants testified on behalf of the defendants to the effect that the weighing on the barges was supervised by the Mail Company's representatives (the Fuel Company having no representative present), and was fairly done, the result of the weighing can only be accounted for in one of two ways: either the theory of fraud is untenable, or else its commission was rendered possible by a wholesale corruption of the Mail Company's agents. The latter theory was the one necessarily adopted by the government on the trial, and was sought to be established by the suggestion that the officers and servants of the Mail Company, from its vice-president and general man-

ager down to its tally clerk on the barges, were *bribed* by the Fuel Company, were in fact bought and corrupted by the paltry Christmas gifts and occasional tons of coal allowed them by the Fuel Company as a matter of ordinary business courtesy.

Passing this consideration, however, the inquiry remains as to whether such notice and knowledge of the alleged fraud was by the evidence so brought home to James B. Smith as to fairly or at all warrant the jury in finding that he was a party to it, and one of a conspiracy to bring it about.

There is not one word in the testimony directly connecting Smith with the matter of weighing on the barges, or indicating that he had any knowledge of the methods there pursued, but, from the court's language, it becomes evident that, in its opinion, the jury was justified in holding that this knowledge was conveyed to Smith by Mills' records or by the reports based thereon made daily by Mills to him. But there was no evidence showing that Smith ever saw Mills' record. He himself testified positively that he never saw it, and, in the absence of contradictory proof, this must be taken as an established fact, and the question is narrowed down to one concerning what notice and knowledge, if any, of improper practices on the barges was brought to him by Mills' reports.

Those reports did, indeed, show frequently great disparities between the quantities laden on and the quantities discharged from the barges, but is it

legally true that this mere showing must have brought to Smith's mind knowledge of the way in which the disparities were produced, or that they were produced by improper practices in the matter of filling the buckets? The disparities totalled only five per cent, and, as this court finds, could well be accounted for by the fact that the shovellers had more time to fill the weighed buckets, by the flooding of the coal with water, or by incompetence or negligence on the part of the government weighers, or by the adoption of a faulty system.

Now, it is earnestly asked, why would not Smith have been justified in thinking as this court thinks, in assuming that the disparities were actually produced by some or all of the causes which this court thinks may have produced them, causes for which he was not responsible and which he could not control? Why was he not justified in treating the whole matter of weighing as something exclusively between the government and the Pacific Mail, in accepting the reports as to the results of the weighing sent him by that company, and basing his charges for coal delivered upon those reports? Is he not entitled to the presumption, inherent in the legal presumption of his innocence, that he had no knowledge of wrongdoing on the part of his subordinates, and was lulled into a feeling of security that the barge weighing was being rightly done by the acquiescence of the government weighers and inspectors and the tally clerks of the Mail Company in what was being done under their very eyes? The

whole system of weighing was devised by the government; Smith's company inherited it when they bought from the Rosenfelds; Mills, the superintendent on the docks and barges, had held the same position for the Rosenfelds. Was it not natural that Smith should assume that practices, which had obtained for years before the Fuel Company purchased, and which had always satisfied the government and all other parties concerned, had been and were still being properly pursued?

But, looking beyond these mere presumptions of innocence on Smith's part, it may be well to enquire more closely into the nature of these reports, what part they played in the business of the Fuel Company, and what knowledge they conveyed to Smith.

In this connection it has been remarked by the court, that

“it was and is practically conceded that the tonnage discharged from these barges exceeded the ascertained weight of the coal laden upon them by approximately five per cent.”

Most respectfully it is urged that the court has here fallen into error. No such concession was ever made on behalf of the defendants at the trial, or by the argument of their counsel in this court. No such concession could in fact have been made, because *the weight of the coal laden on the barges never was ascertained.*

The five per cent alluded to by the court measured the excess of weights returned by the government

weighers over the figures recorded in Mills' books, but there is absolutely nothing in the whole case to show that the figures in Mills' books concerning the weights taken on the barges were correct.

Neither Mills nor any other mortal man ever knew or could have known how much was laden on the barges, nor was there any necessity, in the conduct of the Company's business, for any accurate knowledge on the subject to be obtained or recorded.

As the coal came from the ship's side at the wharf it was taken to the yard and piled, or dumped into the bunkers on the wharf which were used for deliveries to the city trade, or into the "off-shore" bunkers, which were at the end of the wharf and used for deliveries to barges or to schooners. As these different dispositions of the incoming coal were made by Mayer he took notes of the quantities dumped into these various places, which were reported to Mills, who made corresponding entries in his books, so that, if the figures reported were correct, and it may be remarked parenthetically that in the hurry of weighing there was every room and chance for incorrectness, Mills had some knowledge, more or less exact, of how much was piled in the yard and how much was placed in each one of the bunkers.

When it came to the loading of a barge, Mills did the best he could under the circumstances and the system followed, and noted in his book, for

instance, that the contents of an off-shore bunker, of which he assumed that he knew the weight, were placed on the barge. But manifestly he could not know the weight of coal in any bunker. If, as the government contends, coal had been dropped into the bunker without weighing, the bunker held more than his record showed. Or, if part of the contents of a bunker had been delivered to a schooner, he had no means of knowing how much was left, and could only make a guess at it. And if, as sometimes happened, coal from a pile in the yard, or screenings from the wharf gathered after delivery of screened coal to the local trade, were put on the barge without being weighed at all, he could not even attempt to make a guess at the weight so loaded, and wholly omitted to make any note of its delivery to the barge.

So that it fully appears that his entries of weights put on the barges were and could only have been approximate estimates, and the absolute truth of Smith's statement that he regarded Mills' reports to him as mere approximations of the amounts on hand in the yard, the bunkers, and the barges becomes evident, and the deduction is inevitable that these reports gave him no further or other knowledge, and did not inform him of any irregular practice connected with the filling of buckets.

When Mills had thus entered in his book the weights laden on a barge and the amounts weighed out, and compared the two figures, he entered the discrepancy in his book, and made it part of his

report to the office. According to the government's theory of guilt, then, Mills accurately, painstakingly, kept a plain record of that guilt in a book which lay spread on his desk, accessible to any one, and preserved the damning evidence year by year, with no attempt to cover it up or destroy it, so that when this prosecution began, the government was able to lay its hand on the record, photograph its every page, tabulate its every figure, and make it the basis of the only argument possible in favor of the theory of the prosecution. Not only that; he deliberately sent to the office his reports of the amounts in which he had swindled the Pacific Mail, and these reports lay each morning on the desk of the vice-president with no attempt at their concealment.

Not such is the ordinary conduct of men who conspire in dishonesty and crime. That the manager of the Western Fuel Company should have resorted to such crude methods of fraud as were described in some of the evidence in this case, and that, having done so, he should have unnecessarily made and preserved a minute record of his crimes open to the inspection of government officials during a period of nine years, is as inconceivable as that he should have succeeded in defrauding, to the extent of hundreds of thousands of dollars, a great business corporation that, even today, rests content with the treatment it received at his hands.

If it should be said that the argument here made goes to the *weight* of the evidence, and that, while it might have been properly addressed to the jury, it cannot be considered by an appellate court, the answer is confidently made, that it is, on the contrary, an argument dealing with the right of the jury to make *inferences* not warranted by the evidence, and presents, therefore, a question of law pure and simply. For while it is true that the appellate court will not set aside a reasonable inference drawn by the jury from facts proved (*Hyde v. Stone*, 20 How. 170), it is equally true that it may examine the evidence to see whether there was sufficient to justify the conclusions reached by the jury (*Carter v. Ruddy*, 116 U. S. 493), and that, as was well remarked in *Miller v. Palmer*, 58 Md. 459,

“in order to determine the legal sufficiency of evidence to prove a fact, it is necessary to assume the truth of all the evidence, and add thereto every inference which may be fairly and legitimately drawn therefrom by the jury in the exercise of a reasonable intelligence.”

Acting under this simple and practical rule, the court in that case reversed the judgment on the ground that the jury had drawn an inference of fact unwarranted by the evidence.

The same action was had in *Kilpatrick v. Richardson*, 58 N. W. 932, where it was said:

“A verdict for negligence may be supported by inferences, but such inferences must be the legal, *probable* and reasonable deductions from proved or conceded facts.”

What has been said here is in the attempt to apply this rule by assuming the truth of all the testimony alluded to by the court in regard to improper practices on the bunkers and barges, however incredible or trivial such testimony may be *per se*, and then to ask whether the fact of James B. Smith's guilt may be legitimately drawn therefrom in the exercise of a reasonable intelligence. And, in answer to that question, it is urged that, from the doubtful and disputed facts so supported by some of the testimony and alluded to by the court, no inference can be fairly or legitimately drawn, or could have been fairly or legitimately drawn by the jury, that Smith entered into a conspiracy having for its object the defrauding of the government out of the trivial sums involved in the bunker weighing, or of defrauding the Pacific Mail Steamship Company out of the immense sums involved in the barge weighing. The improbabilities, in either case, are so staggering as to render the inference contended for by the prosecution impossible to a fair and reasonable intelligence.

So viewed, the jury's inference of a guilty knowledge on Smith's part turns out to be merely a wild and arbitrary guess, so grossly improbable as to shock the common sense, and which should now, therefore, it is earnestly contended, be rejected by this court as not warranted by any of the facts in evidence.

The jury before which this case was tried ignored all the considerations which to this court seem to be of controlling importance; gave credence to testimony of the most unreliable character concerning an impossible condition of facts; proceeded upon a supposition for which there was no warrant in the evidence; and reached a conclusion which is at variance with the rules and motives ordinarily governing human conduct and the relations of business men.

From the unfairness of that verdict and the ignominy of the sentence which followed it, the last appeal is to the clearer vision and courageous action of this court.

Dated, San Francisco,
April 17, 1916.

Respectfully submitted,

SIDNEY V. SMITH,

Amicus Curiae.

United States
Circuit Court of Appeals

For the Ninth Circuit.

WOO WAI, WONG CHUNG and WONG YEE,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

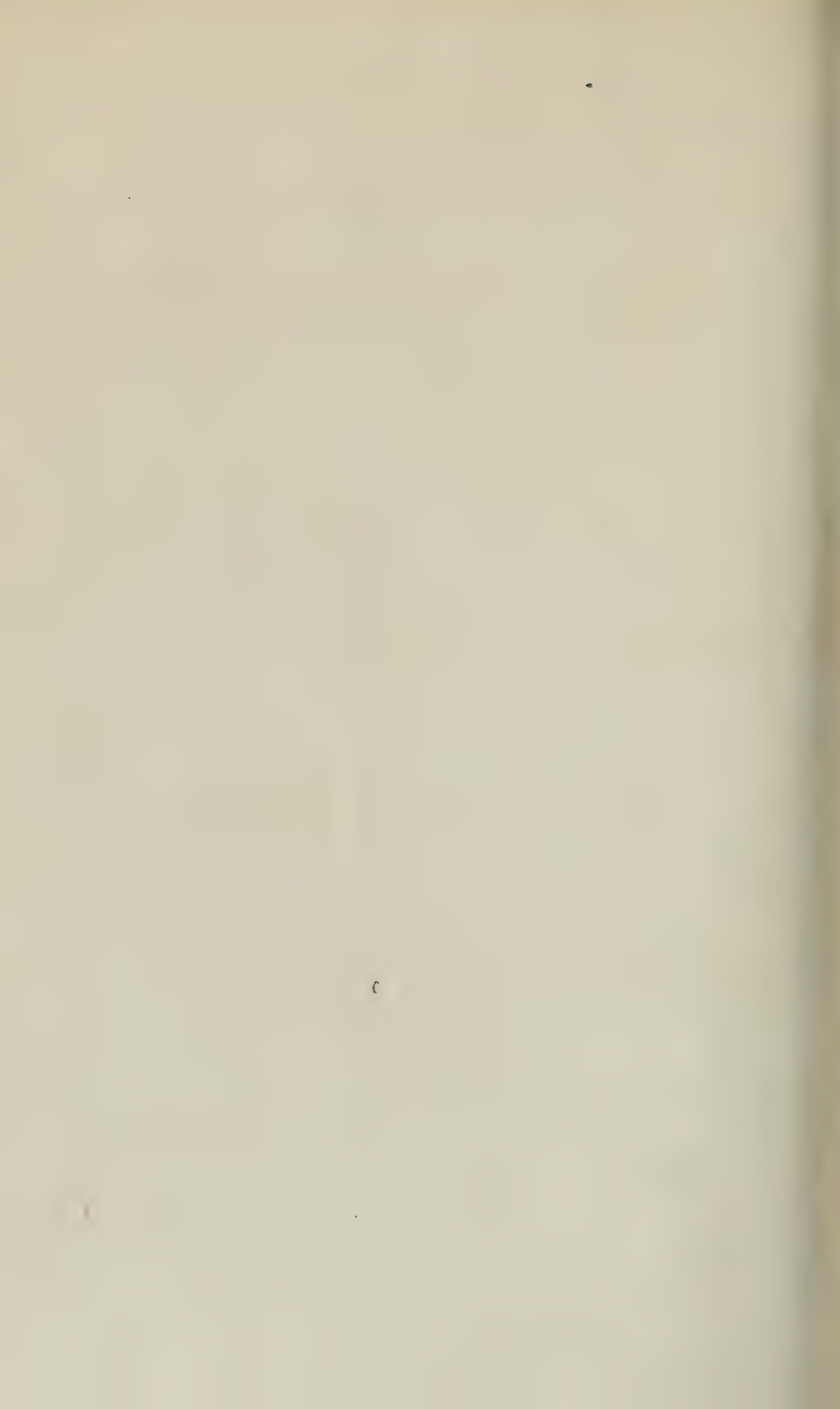
Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

DEC - 4 1914

F. D. Monckton,

Clerk.

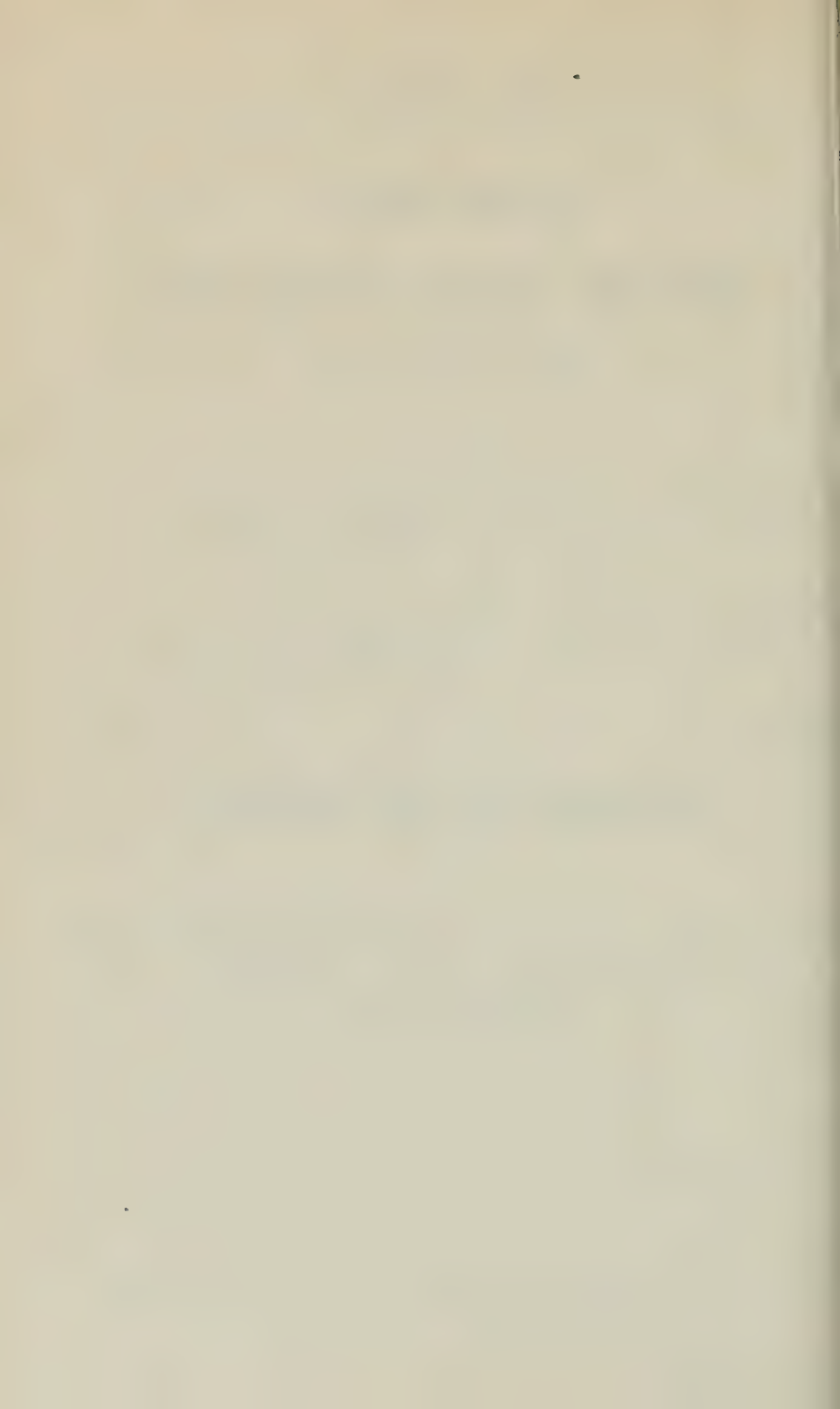


United States
Circuit Court of Appeals
For the Ninth Circuit.

WOO WAI, WONG CHUNG and WONG YEE,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Admission Concerning Wong Wing Sai.....	51
Admission that W. M. Van Dyke is a U. S. Commissioner, etc.....	52
Amended Judgment as to Defendant Wong Chong.. .. .	22
Assignment of Errors.....	191
Attorneys, Names and Addresses of.....	1
Bench Warrant.....	13
Bill of Exceptions.....	26
Bond Given by Wong Yee.....	213
Certificate of Clerk U. S. District Court to Judgment-roll.....	23
Certificate of Clerk U. S. District Court to Transcript of Record.. .. .	218
Citation on Writ of Error (Original).....	4
Copy of Judgment.....	19
Engrossed Bill of Exceptions on Behalf of Defendants Woo Wai, Wong Chung and Wong Yee... ..	26
Exception No. 1.....	27
Exceptions, Bill of.....	26
Exceptions to Certain Instructions Given and Refused.....	187

Index.

Page

EXHIBITS:

U. S. Exhibit No. 5—Letter Dated March 31, 1910—Woo Wai to Conlan.....	65
U. S. Exhibit No. 12—Letter Dated August 22, 1910—H. S. W. W. to Conklin....	70
U. S. Exhibit No. 13—Letter, Dated September 8, 1910—to R. L. Conklin.....	71
U. S. Exhibit No. 14—Letter, Dated October 5, 1910—H. S. W. W. to Conklin..	71
U. S. Exhibit No. 15 for Identification—Letter, Dated November 23, 1910, H. S. W. W. to Conklin and Weddle.....	103
U. S. Exhibit No. 16—Letter, Dated November 24, 1910—H. S. W. W. to Conklin and Weddle..	102
U. S. Exhibit No. 17 for Identification—Letter, Dated December 2, 1910—H. S. W. W. to Conklin..	106
U. S. Exhibit No. 18 for Identification—Letter, Dated December 15, 1910—H. S. W. W. to Conklin.....	106
U. S. Exhibit No. 19 for Identification—Letter, Dated January 5, 1911—H. S. W. W. to Conklin.....	108
U. S. Exhibit No. 20 for Identification—Letter, Dated January 6, 1911, H. S. W. W. to Conklin....	109
U. S. Exhibit No. 21—Letter, Dated January 9, 1911, H. S. W. W. to Conklin...	112
U. S. Exhibit No. 22 for Identification—	

Index.

Page

EXHIBITS—Continued.

Letter, Dated January 8, 1911, H. S.

W. W. to Conklin..... 111

U. S. Exhibit No. 23—Translation of Letter

Contained in..... 133

U. S. Exhibit No. 23 for Identification—

Letter, Dated December 21, 1910, H. S.

W. W. to Mrs. Conklin..... 110

U. S. Exhibit No. 24 for Identification—

Telegram Dated January 10, 1911—H.

S. W. W. to R. L..... 134

U. S. Exhibit No. 27—Letter, Dated De-

cember 2, 1908—Sanford to Conklin.. 67

Defendants' Exhibit "A" — Telegram,

Dated October 24, 1908—Sanford to

Weddle 77

Defendants' Exhibit "B"—Telegram, Dated

October 25—Sanford to Weddle..... 78

Defendants' Exhibit "C"—Card..... 82

Defendants' Exhibit "D"—Letter, Dated

January 8, 1911—R. L. to Woo Wai.. 84

Defendants' Exhibit "D"—Card..... 157

Defendants' Exhibit "G" — Telegram,

Dated November 27, 1910—Conklin to

Weddle 86

Defendants' Exhibit "H" — Telegram,

Dated January 8, 1911, R. L. to Woo

Wai.... 86

Defendants' Exhibit "I"—Letter, Dated

January 2, 1911, R. L. to Woo Wai.... 87

Indictment..... 6

Index.	Page
Instructions of Court to Jury.....	170
Instructions Requested by Defendants and Re- fused.....	188
Judgment.....	19
Judgment as to Wong Chung, Amended.....	22
Names and Addresses of Attorneys.....	1
Order Admitting Wong Chung to Bail in Sum of \$3,500.....	225
Order Admitting Wong Yee to Bail in Sum of \$3,500.....	223
Order Admitting Woo Wai to Bail in Sum of \$10,000.....	228
Order Allowing Writ of Error and Supersedeas on Behalf of Wong Chung.....	203
Order Allowing Writ of Error and Supersedeas on Behalf of Wong Yee.....	201
Order Allowing Writ of Error and Superse- deas on Behalf of Woo Wai.....	200
Order Enlarging Time to November 1, 1914, to File Record Thereof and Docket Cause in Circuit Court of Appeals.....	220
Order Settling Bill of Exceptions.....	190
Petition for Writ of Error.....	197
Plea of Woo Wai.....	17
Pleas of Wong Chung and Wong Wing Sai....	16
Praecept for Transcript of Record.....	216
Stipulation Admitting Woo Wai to Bail in Sum of \$10,000.....	226
Stipulation as to Printing Record.....	229
Stipulation for Admission of Wong Chung to Bail in Sum of \$3,500.....	224

Index.

Page

Stipulation for Admission of Wong Yee to Bail in Sum of \$3,500.....	221
Stipulation Re Settlement of Bill of Exceptions.	189
Supersedeas Bond Given by Wong Chung.....	209
Supersedeas Bond Given by Wong Yee.....	206
Supersedeas Bond Given by Woo Wai.....	203
TESTIMONY ON BEHALF OF THE GOV- ERNMENT:	
BIRMINGHAM, JOHN, Jr.....	40
Cross-examination... ..	41
Redirect Examination.....	41
CAMERON, DONALDINA (in Rebuttal)	169
CAPDEVILLE, PETE.....	51
CHAN KIU SAN.....	35
CONKLIN, RALPH L.....	96
Cross-examination.....	115
Redirect Examination.....	132
In Rebuttal.....	170
CRAMER, N. G.....	38
LANIER, K. C.....	27
Cross-examination... ..	29
Redirect Examination.....	30
MAR JICK.....	42
Cross-examination... ..	50
MORGAN, C. O.....	52
MORTON, L. C.....	35
MULVANE, A. H.....	54
POPPETT, EDWARD.....	54
QUAN BO.....	55
Cross-examination.. ..	56
SANFORD, FERNANDO.....	63
SIMS, C. A.....	51

Index.	Page
TESTIMONY ON BEHALF OF THE GOV- ERNMENT—Continued:	
SPITLER, D. M.....	53
TRIMBLE, FREDERICK R.....	32
VALENZUELA, PEDRO.....	30
WEDDLE, HARRY H.....	64
Cross-examination.....	74
Redirect Examination.....	94
Recross-examination.....	94
Recalled	94
Cross-examination... ..	95
WONG DOM HIM.....	59
WONG GING FOON.....	62
WONG GING WEE.....	57
WONG SUN.....	61
TESTIMONY ON BEHALF OF DEFEND- ANTS:	
BIRMINGHAM, JOHN, Jr.....	135
GOSLINER, N. A.....	137
HOYT, FREDERICK B.....	136
PECK, C. S.....	136
QUINN, JOHN J.....	135
SANBORN, I. H.....	137
THOMAS, B. M.....	136
TOM KING CHONG.....	134
WONG CHUNG.....	167
Cross-examination.. ..	169
WONG YEE.....	154
Cross-examination.....	166
WOO WAI.....	137
Cross-examination	152

Index.

Page

Translation of Letter Contained in U. S. Exhibit No. 23.....	133
Verdict.....	19
Witnesses for Government in Rebuttal.....	169
Writ of Error (Original).....	2

Names and Addresses of Attorneys.

For Plaintiffs in Error:

Messrs. J. C. CAMPELL, WEAVER, SHELTON & LEVY, 659 Mills Building, San Francisco, California;

Messrs. DENIS & LOEWENTHAL, 414 Wilcox Building, Los Angeles, California; and
C. H. SOOY, Esq., Mills Building, San Francisco, California.

For Defendants in Error:

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California; and
HARRY R. ARCHBALD, Esq., Assistant U. S. Attorney, Los Angeles, California. [6*]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

*Page-number appearing at foot of page of original certified Record.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to
the Honorable the Judge of the District Court
of the United States for the Southern District
of California, Southern Division, Greeting:

Because in the record and proceedings as also in
the rendition of the judgment of a plea which is in
the said District Court before you, between Woo
Wai, Wong Chung and Wong Yee, plaintiffs in er-
ror, and the United States of America, defendant in
error, a manifest error hath happened to the great
damage of said Woo Wai, Wong Chung and Wong
Yee, plaintiffs in error, as by their complaint
appears:

We being willing that error, if any hath happened,
should be duly corrected, and full and speedy justice
done to the parties aforesaid, in this behalf, do com-
mand you, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings aforesaid with all things con-
cerning the same to the United States Circuit Court
of Appeals for the Ninth Circuit, together with this
Writ, so that you have the same at the city of San
Francisco, in the State of California, within thirty
days from [7] the date hereof, in the said Cir-
cuit Court of Appeals to be then and there held, that
the record and proceedings aforesaid, being in-
spected, the said Circuit Court of Appeals may cause
further to be done therein to correct that error what

of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 23d day of September, in the year of our Lord, 1912.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court, Southern District of California, Southern Division.

By C. E. Scott,
Deputy Clerk.

Allowed by:

OLIN WELLBORN,
Judge.

I hereby certify that a copy of the within Writ of Error was, on the 23d day of September, 1912, lodged in the clerk's office of the said United States District Court for the Southern District of California, Southern Division, for the said defendants in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By C. E. Scott,
Deputy Clerk. [8]

[Endorsed]: No. 303—Crim. United States Circuit Court of Appeals, Ninth Circuit. Writ of Error. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [9]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

Citation [on Writ of Error (Original)].

United States of America—ss.

The President of the United States to the United States of America, and A. I. McCormick, United States Attorney, Dudley W. Robinson, Assistant United States Attorney, Edward A. Regan, Assistant United States Attorney, and Frank M. Stewart, Special Assistant United States Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein Woo Wai, Wong Chung and Wong Yee are plaintiffs in error, and you are defendant in error, to show cause if any there be, why the judgment in

the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 23d day of September, A. D. 1912, and of the independence of the United States the one hundred and thirty-seventh.

OLIN WELLBORN,
United States District Judge, Southern District of
California, Southern Division.

Attest: WM. M. VAN DYKE,
Clerk.

By C. E. Scott,
Deputy Clerk. [10]

[Endorsed]: No. 303—Crim. United States Circuit Court of Appeals, Ninth Circuit. Woo Wai et al., Plaintiff in Error, vs. United States of America, Defendants in Error. Citation. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.

Received copy of the within Citation this 23d day of September, 1912.

A. I. McCORMICK,
Attorney for United States.
DUDLEY W. ROBINSON,
Assistant. [11]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 303—CRIMINAL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants. [12]

[Indictment.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

At a stated term of said court, begun and holden at the city of Los Angeles, county of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and eleven,—

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Siaz, and Tomas Valenzuela, whose full and true names are and each of them is, other than as herein stated, to the Grand Jurors unknown, being

evil-minded persons, heretofore, to wit, on the first day of April, 1910, at and within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, willfully, wickedly, unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with divers other persons whose names are to the said Grand Jurors unknown, to commit certain offenses against the United States, that is to say:

They, the said Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Siaz and Tomas Valenzuela, did, at the time and place aforesaid, knowingly, willfully, wickedly, unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with said divers other persons [13] whose names are, as aforesaid, to the Grand Jurors unknown, to willfully, unlawfully and knowingly bring into and cause to be brought into, and aid and abet the bringing into, the United States, by land, at divers points and places in the Southern Division of the Southern District of California (said points and places being to the Grand Jurors unknown), from divers points and places in the Republic of Mexico, to wit, from the town of Ensenada, in said Republic of Mexico, and from other points and places in said Republic of Mexico, the names of which said other points and places being to the said Grand Jurors unknown, certain Chinese persons, to wit, Wong Ging Foon, Wong Ging Wee, Wong Sum, Wong Kum, Wong Dom Him, each being a Chinese person and any and

all other and additional Chinese persons who were then, and those who would thereafter be, in said Republic of Mexico, desiring and intending to enter the United States whose names are and each of them is, other than as herein stated, to the said Grand Jurors unknown, and which said Chinese persons, as they, the said Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Saiz and Tomas Valenzuela, and said divers other persons whose names are to the Grand Jurors unknown, then and there well knew, were not nor was either or any of them, then and there, or at any time thereafter, or at all, entitled, permitted or allowed by the laws of the United States, to enter or remain in the United States, and each of which said Chinese persons, as they, the said Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Saiz and Tomas Valenzuela, and said divers other persons, then and there, and at all times in this indictment mentioned and referred to, well knew, was, then and there [14] and at all times in this indictment mentioned and referred to, would be, a Chinese laborer and a native of China, and a person of Chinese descent, and would not have, and would not be entitled to have, a certificate of residence entitling him to enter, be or remain in the United States.

That said conspiracy, confederation, combination and agreement, between the said Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Siaz and Tomas Valenzuela, and the said divers other persons whose

names are, as aforesaid, to the Grand Jurors unknown, was continuously, throughout all of the time from and after said first day of April, 1910, and at all of the times in this indictment mentioned and referred to, and particularly at the time of the commission of each and all of the overt acts in this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Lerdo Gonzales, Rosario Siaz and Tomas Valenzuela, on or about the 15th day of December, 1910, at a point or place in the Republic of Mexico, to wit, at the said town of Ensenada, took charge and control of eight (8) certain Chinese persons, to wit, said Wong Ging Foon, Wong Ging Wee, Wong Sum, Wong Kum, Wong Dom Him and three (3) other and additional Chinese persons, the full and true names of said eight (8) Chinese persons and each of them, other than as herein stated, being to the said Grand Jurors unknown, and did, thereafter, to wit, on or about the [15] 25th day of December, 1910, willfully, unlawfully and knowingly bring and convey, and cause to be brought and conveyed, by land, at a point in the Southern Division of the Southern District of California, to the Grand Jurors unknown, said eight (8) Chinese persons from said Republic of Mexico into and within the United States and into and within the County of San Diego,

State, Division and District aforesaid, the said eight (8) Chinese persons, and each of them, as they, the said Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Siaz and Tomas Valenzuela, and said divers other persons to the Grand Jurors unknown, and each of them, then and there well knew, not being then and there, or at any time in this indictment mentioned and referred to, lawfully entitled to enter or remain in the United States, and each of said eight (8) Chinese persons being then and there and at all times in this indictment mentioned and referred to, a Chinese laborer, and a native of China, and a person of Chinese descent, not having and not entitled to have a certificate of residence entitling him to enter, be or remain in the United States.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in further execution of said conspiracy, combination, confederation and agreement, and to further effect and accomplish the object thereof, the said Wong Chung, on the 11th day of January, 1911, in the city of San Bernardino, county of San Bernardino, within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did take charge and control of said Wong Sum, Wong Kum and Wong Dom Him, and did then and there purchase railroad [16] tickets for said Wong Sum, Wong Kum and Wong Dom Him, for their conveyance by railroad from said city of San Bernardino to the city of San Francisco, in the Northern District of California,

and did then and there place said Wong Sum, Wong Kum and Wong Dom Him on a passenger train of the Atchison, Topeka, and Santa Fe Railway Company en route from the city of Los Angeles in the Southern District of California, by way of said city of San Bernardino, to said city of San Francisco, he, the said Wong Chung, then and there well knowing that the said Wong Sum, Wong Kum and Wong Dom Him had theretofore, as aforesaid, been unlawfully and knowingly smuggled and brought into the United States from the Republic of Mexico, and then and there well knowing that they, the said Wong Sum, Wong Kum and Wong Dom Him were then and there, and each of them was a Chinese laborer and a native of China and a person of Chinese descent and not having and not entitled to have a certificate of residence entitling him to enter, be or remain in the United States.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in further execution of said conspiracy, combination, confederation and agreement, and to further effect and accomplish the object thereof, the said Wong Wing Sai, on the 12th day of January, 1911, in the city of San Bernardino, county of San Bernardino, within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did take charge and control of said Wong Ging Wee and Wong Ging Foon, and did then and there purchase railroad tickets for said Wong Ging Wee and Wong Ging Foon, for their conveyance by railroad from said

city of [17] San Bernardino to the city of San Francisco, in the Northern District of California, and did then and there place said Wong Ging Wee and Wong Ging Foon on a passenger train of the Atchison, Topeka, and Santa Fe Railway Company en route from the city of Los Angeles in the Southern District of California, by way of said city of San Bernardino, to said city of San Francisco, he, the said Wong Wing Sai, then and there well knowing that the said Wong Ging Wee and Wong Ging Foon had theretofore, as aforesaid, been unlawfully and knowingly smuggled and brought into the United States from the Republic of Mexico, and then and there well knowing that they, the said Wong Ging Wee and Wong Ging Foon were then and there, and each of them was a Chinese laborer, and a native of China, and a person of Chinese descent, and not having and not entitled to have a certificate of residence entitling him to enter, be or remain in the United States.

Contrary to the form of the Statutes of the United States in such case made and provided and against the peace and dignity of the said United States.

A. I. McCORMICK,
United States Attorney.

[Endorsed]: No. 303. United States District Court, Southern District of California, Southern Division. The United States of America vs. Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Siaz and Tomas Valenzuela. Indictment for Violation of Section 37, U. S. Criminal Code, and Act of July

5, 1884. Conspiracy to Smuggle Chinese Laborers into the United States. *T* True Bill. E. C. Bel-
lows, Foreman. [18]. Presented and filed in open
court this 9th day of February, A. D. 1911. E. H.
Owen, Clerk. ———, Deputy Clerk. ———,
United States Attorney.

[Endorsed]: Names of witnesses examined before
the said Grand Jury on finding the foregoing indict-
ment: C. O. Morgan, C. A. Sims, John Culberson, D.
M. Spittler, A. H. Mulvane, Ed. Proppett, Wong
Sum, Wong Dom Him, Wong Ging Wee, R. L.
Conklin, H. H. Weddle, W. C. Guerth, L. C. Mor-
ton, W. E. Smith, S. King Lanier, Peter Capdeville,
Wm. J. Healy, Geo. A. Lawrence. [19]

[Bench Warrant.]

UNITED STATES OF AMERICA.

Southern District of California,
Southern Division,—ss.

To the Marshal of the United States of America, for
the Southern District of California, and His
Deputies, or Any or Either of Them, Greeting:

WHEREAS, at a District Court of the United
States of America, for the Southern Dis-
[Seal] trict of California, begun and held at the
City and County of Los Angeles, within
and for the District aforesaid, on the 9th day of
February, in the year of our Lord, one thousand
nine hundred and eleven, the Grand Jurors in and
for the said District brought into the said court a
true Bill of Indictment against Woo Wai, Wong

Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Saiz, and Tomas Valenzuela, for violation of section 37, U. S. Criminal Code and Act of July 5, 1884. Conspiracy to smuggle Chinese laborers into the United States, as by the same indictment, now remaining on file and of record in said Court, will more fully appear; to which Indictment the said Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Saiz and Tomas Valenzuela have not yet appeared or pleaded:

NOW, THEREFORE, you are hereby commanded, in the name of the PRESIDENT OF THE UNITED STATES OF AMERICA, to apprehend the said Woo Wai, Wong Chung, Wong Wing Sai, Mar Jick, Wong Yee, Mar Luck, Lerdo Gonzales, Rosario Saiz and Tomas Valenzuela and them bring before the said Court, at the United States District courtroom, in the City and County of Los Angeles; to answer the Indictment aforesaid.

WITNESS, the Hon. OLIN WELLBORN, Judge of the said District Court, and the seal thereof, at the City and County of Los Angeles, the 10th day of February, A. D. 1911.

Attest: E. H. OWEN,
Clerk.

By C. E. Scott,
Deputy Clerk.

A. I. McCORMICK,
U. S. Attorney. [20]

[Endorsed]: Marshal's Criminal Docket No. 3858.
No. 303—Criminal. United States District Court,

Southern District of California, Southern Division.
The United States of America vs. Woo Wai et al.
Bench Warrant. Bail fixed at \$5,000.00 each. A.
I. McCormick, U. S. Attorney. Filed Jul. 11, 1911.
190. E. H. Owen, Clerk. By C. E. Scott, Deputy
Clerk.

United States of America,
Southern District of California.

In obedience to the Warrant I have the body of
the said Tomas Valenzuela before the Honorable
the District Court of the United States, in and for
the Southern District of California, this 28th day of
April, A. D. 1911.

LEO V. YOUNG WORTH,
U. S. Marshal.
By H. J. Place,
Deputy U. S. Marshal.

MARSHAL'S OFFICE.

United States of America,
Southern District of California.

In obedience to the Warrant I have the bodies of
the said Woo Wai, Wong Chung, Wong Wing Sai,
Mar Jick and Wong Yee, before the Honorable the
District Court of the United States, in and for the
Southern District of California, this 11th day of
July, A. D. 1911.

LEO V. YOUNG WORTH,
U. S. Marshal.
By Ervin Dingle,
Deputy U. S. Marshal.

Received April 10th, 1911, at 12:30 o'clock P. M.,
from H. J. Place, by T. D. Stanley, Jailer. [21]

Pleas of Wong Chung and Wong Wing Sai.

At a stated term, to wit, the January term, A. D. 1911, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Wednesday, the 15th day of February, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable OLIN WELLBORN, District Judge.

No. 303—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI,
MAR JICK, WONG YEE, MAR LUCK,
LERDO GONZALES, ROSARIO SIAZ, and
TOMAS VALENZUELA,

Defendants.

Indictment for violation of Sec. 37, U. S. Crim. Code, and Act of July 5, 1884, conspiracy to smuggle Chinese into the United States. Frank Stewart, Esq., Assistant U. S. Attorney, present as counsel for the United States; defendant Wong Chung present in court with his attorney, Geo. J. Denis, Esq.; defendant Wong Wing Sai present in custody of the U. S. Marshal, with his attorneys, Messrs. McGowen & Haas; and Chan Kiu Sing having been sworn as interpreter of the Chinese and English languages;

and defendant Wong Chung having been called and arraigned through said interpreter, Chan Kiu Sing, having stated that his true name is Wong Chung, having waived the reading of the indictment, and, on being required to plead to said indictment, said defendant having plead not guilty as charged therein (with permission hereafter to withdraw said plea should he be so advised), which plea is by order of the Court hereby entered herein; and defendant Wong Wing Sai, present in custody of the U. S. Marshal, having been called and arraigned through said interpreter, having given his true name as Wong Wing Sai, having waived the reading of the indictment, and, on being required to plead to said indictment, said defendant having plead not guilty as charged therein (with permission hereafter to withdraw said plea should he be so advised), which plea is by order of the Court hereby entered herein; said defendant Wong Wing Sai is thereupon remanded to the custody of the U. S. Marshal. [22]

Plea of Woo Wai.

At a stated term, to wit, the January term, A. D. 1911, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 6th day of March, in the year of our Lord one thousand, nine hundred and eleven. Present: The Honorable OLIN WELLBORN, District Judge.

No. 303—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WOO WAI, WONG CHUNG (true name WONG
CHONG), WONG WING SAI, MAR JICK,
WONG YEE, MAR LUCK, LERDO GON-
ZALES, ROSARIO SAIZ, and TOMAS
VALENZUELA,

Defendants.

Indictment for violation of Sec. 37, U. S. Crim. Code, and Act of July 5, 1884, conspiracy to smuggle Chinese laborers into the United States. Frank Stewart, Esq., Assistant U. S. Attorney, present as counsel for the United States; defendant Woo Wai present in court, with his attorney; this cause coming on on this day for the arraignment of said defendant Woo Wai, and for the entry of his plea; and said defendant having been called and arraigned, having stated that his true name is Woo Wai, having waived the reading of the indictment, and, on being required to plead to said indictment, said defendant having plead not guilty as charged therein, which plea is by order of the Court hereby entered herein, with leave to said defendant to hereafter withdraw said plea if he should be so advised, and thereupon, good cause appearing therefor, it is ordered that said cause be, and the same hereby is passed for the setting of the same down for trial.

[Verdict.]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

No. 303—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
WOO WAI et al.,
Defendants.

We, the jury in the above-entitled cause, find the defendants Woo Wai, Wong Chong (indicted herein as Wong Chung), Wong Wing Sai and Wong Yee guilty as charged in the indictment.

Los Angeles, Cal., Mar. 23, 1912.

H. H. KERCKHOFF,
Foreman.

No. 303—Crim. U. S. District Court, So. Dist. of Calif., So. Div. United States vs. Woo Wai et al. Verdict. Filed March 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [51]

Copy of Judgment.

At a stated term, to wit, the January term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the 25th day of March, in the year of

our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 303—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WOO WAI et al.,

Defendants.

This cause coming on this day for the sentence of defendants Woo Wai, Wong Chong (indicted herein as Wong Chung), Wong Wing Sai and Wong Yee; Frank Stewart, Esq., Special Assistant U. S. Attorney, and Dudley W. Robinson, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants Woo Wai, Wong Chong (indicted herein as Wong Chung), Wong Wing Sai and Wong Yee being present, with their attorneys, Jos. C. Campbell, Esq., Geo. J. Denis, Esq., and C. H. Sooy, Esq.; E. L. Kincaid present as shorthand reporter of the testimony and proceedings, and said defendants, by their attorney, Jos. C. Campbell, Esq., having moved the Court that a new trial be granted said defendants, which motion is submitted to the Court for its consideration and decision, it is now by the Court ordered that said motion for a new trial be, and the same hereby is denied, to which ruling of the Court, on motion of said four convicted defendants, by their attorney, Jos. C. Campbell, Esq., exceptions are by direction of the Court hereby noted on behalf of said defendants, and said four defendants having, by Jos. C. Campbell, Esq., their

attorney, made and presented a [52] motion in arrest of judgment, which motion is submitted to the Court for its consideration and decision; it is now by the Court ordered that said motion in arrest of judgment be, and the same hereby is denied, to which ruling of the Court, on motion of said four convicted defendants, by their attorney, Jos. C. Campbell, Esq., exceptions are by direction of the Court hereby noted on behalf of said defendants; and statements regarding sentence having been made by Jos. C. Campbell, Esq., attorney for said convicted defendants, the Court thereupon calls said four defendants severally and pronounces sentence upon them respectively as follows, to wit: The Judgment of the Court is, that the defendant Wong Wing Sai be imprisoned in the County Jail of Los Angeles County, California, for a term of six (6) months; the Judgment of the Court is, that the defendant Wong Yee be imprisoned in the County Jail of Los Angeles County, California, for a term of one (1) year, and that he pay a fine of two thousand (2,000) dollars; the Judgment of the Court is, that the defendant Wong Chong (indicted herein as Wong Chung) be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for a term of one (1) year and one (1) day, and that he pay a fine of three thousand (3,000) dollars; the Judgment of the Court is that the defendant Woo Wai be imprisoned for a term of eighteen (18) months in the United States Penitentiary at McNeil Island, State of Washington, and that he pay a fine of five thousand (5,000) dollars; it is

thereupon further ordered by the Court, that, pending the taking of any steps to review said respective judgments that the respective defendants may be advised to take, defendant Wong Wing Sai remain at large upon bail bond already given; that defendant Wong Yee give an appearance bond in the sum of \$7,500.00; that defendant Wong Chong (indicted herein as Wong Chung) give an appearance bond in the sum of \$10,000.00; and that defendant Woo Wai [53] give an appearance bond in the sum of \$15,000.00; and it is further ordered that until said new bonds are given defendants Wong Yee, Wong Chong (indicted herein as Wong Chung) and Woo Wai be, and they hereby are remanded to the custody of the U. S. Marshal; and that, upon the giving of the new bonds, the present bail bonds of said last named three defendants be exonerated; and it is further by the Court ordered, on motion of Jos. C. Campbell, Esq., attorney for the convicted defendants, that a stay of execution for the period of thirty (30) days be, and the same hereby is granted. [54]

Amended Judgment as to Defendant Wong Chong.

At a stated term, to wit, the January term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the 26th day of March, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 303—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WOO WAI et al.,

Defendants.

Dudley W. Robinson, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendant Wong Chong (indicted herein as Wong Chung) present, with his attorney, Geo. J. Denis, Esq., it is thereupon by the Court ordered that the judgment of the Court as to said defendant Wong Chong (indicted herein as Wong Chung), entered herein on Monday, the 25th day of March, A. D. 1912, be, and the same hereby is changed so that the same shall read as follows, to wit: The Judgment of the Court is, that the defendant Wong Chong (indicted herein as Wong Chung) be imprisoned in the County Jail of Los Angeles County, California, for a term of one (1) year, and that he pay a fine of \$3,000.00.
[55]

[Certificate of Clerk U. S. District Court to
Judgment-roll.]

(Portions of Judgment-roll omitted in accordance with Praecept for Preparation of Transcript on Appeal filed by Plaintiffs in Error.)

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 303—CRIM.

THE UNITED STATES

vs.

WOO WAI et al.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States, in and for the Southern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled cause.

ATTEST my hand and the seal of said Court this 28th day of March, A. D. 1912.

[Seal]

WM. M. VAN DYKE,

Clerk.

Virgil W. Owen,

Deputy Clerk.

[Endorsed]: No. 303—Crim. U. S. District Court, Southern District of California, Southern Division. The United States vs. Woo Wai et al. Judgment-roll. Filed Mar. 28, 1912. Wm. M. Van Dyke, Clerk. Deputy, Virgil W. Owen. [56]

At a stated term, to wit, the January term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the first day of April, in the year of

our Lord one thousand nine hundred and twelve.
Present: The Honorable OLIN WELLBORN,
District Judge.

No. 303—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WOO WAI et al.,

Defendants.

On motion of Geo. J. Denis, Esq., of counsel for defendants, and with the consent of Dudley W. Robinson, Esq., Assistant U. S. Attorney, it is ordered that defendants Woo Wai, Wong Chong (indicted herein as Wong Chung), and Wong Yee be, and they hereby are granted thirty (30) days' additional time within which to prepare, serve and file a bill of exceptions herein. And thereupon, on motion of Dudley W. Robinson, Esq., Assistant U. S. Attorney, it appearing that defendant Wong Wing Sai, who is present in court, desires to have the stay of execution herein vacated and set aside as to said defendant Wong Wing Sai, and that he be remanded to commence serving his sentence herein, it is ordered that said stay of execution be, and the same hereby is vacated and set aside as to defendant Wong Wing Sai, and that said defendant Wong Wing Sai be, and he hereby is remanded to the custody of the U. S. Marshal. [57]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

**Engrossed Bill of Exceptions on Behalf of
Defendants Woo Wai, Wong Chung, and Wong
Yee.**

BE IT REMEMBERED that heretofore the Grand Jury of the United States in and for the Southern Division of the Southern District of California, did find and return in the above-entitled court its indictment against Woo Wai, Wong Chung, Wong Wing Sai and Wong Yee, and thereafter the said defendants appeared in the said court, having duly pleaded as shown by the record herein, and the case being at issue, the same came on for trial on Tuesday, March 12th, 1912, before the Honorable William C. Van Fleet, District Judge of the Northern District duly assigned to hold the District Court of said Southern District, the United States of America being represented by Frank Stewart, Esq., Special Assistant United States Attorney, and the defendants by Joseph C. Campbell, George J. Denis and Charles H. Sooy, Esquires. Upon instruction of the Court, the clerk read the indictment upon which the

defendants were to be tried to the jury, which had theretofore been duly impanelled and sworn to try the case.

[Testimony of K. C. Lanier, for the Government.]

K. C. LANIER, a witness called on behalf of the United States, was duly sworn. He was then asked the following question by Mr. Stewart:

Q. State your full name. [88]

Mr. Campbell, for the defendants, then interposed an objection to any evidence being taken under the indictment, on the ground that it failed to state an offense under section 5440 of the Revised Statutes of the United States, or under the new Criminal Code, or any offense of conspiracy; on the ground that it fails to allege the doing of any overt act in furtherance of the conspiracy sought to be alleged or of any conspiracy whatsoever. That the second and third overt acts sought to be alleged were done after the object of the alleged conspiracy had been fully and completely consummated.

The matter was argued and the objection overruled by the Court. To said ruling the defendants then and there excepted.

Exception No. 1.

Thereupon, the witness being examined by Mr. Stewart, testified as follows:

My full name is King Lanier. I reside at San Diego, where I have resided in the city for from four to four and a half years, and in the county of San Diego for six years. At present I am in the florist business and hotel business. I own the Lanier

(Testimony of K. C. Lanier.)

Hotel, which I have conducted for four years. I have seen the defendant Woo Wai before. I saw him in October, 1908, first at the Santa Fe depot, in San Diego. I then took him in my machine from the train to the Hotel Lanier, 3d and Ash Streets. The defendant stopped and registered at my hotel. I saw him register. I recognize some pages at the top of which are the words: "The Lanier, San Diego, Cal."—especially the pages at the bottom of which appear the words "Sunday, October 25th, 1908," and "Monday, October 26th, 1908," as part of my hotel register in use at that time, and I saw the defendant, Woo Wai, write his signature thereon at the time indicated on the page. From seeing the defendant, [89*—2†] Woo Wai, write that signature, I became acquainted with his signature. It is my opinion that the signatures "Woo Wai" on the back and front of each of three railroad tickets of the Santa Fe Railroad Company now shown to me are the signatures of the defendant, Woo Wai.

Thereupon the said pages of the hotel register were marked "United States Exhibit 1 for Identification," and the said railroad tickets were marked "United States Exhibits 2, 3, and 4 for Identification."

Q. (By Mr. STEWART.) I show you now a letter, dated "San Francisco, March 31, 1910," ending "Yours respectfully, Woo Wai," and ask you who, in your opinion, wrote the signature "Woo Wai."

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

(Testimony of K. C. Lanier.)

Thereupon, the said letter was exhibited to counsel for the defendants.

Mr. CAMPBELL.—I have no objection to that. I admit Woo Wai signed it.

Thereupon, the said letter was marked “United States Exhibit 5 for Identification.”

Cross-examination.

(By Mr. CAMPBELL.)

My business is hotel and florist. I have been in the hotel business four years. I have never made a study of handwriting—only by seeing the handwriting on my register. I would be able to tell the handwriting now of a man who signed his name on my register in 1908. I would be able to tell the handwriting of the person who signed just above Woo Wai. I remember that man, “Mr. Roy.” I knew him at the time he came into the hotel—I knew his name was Roy when he registered. I can only tell a man’s name by his registry. That is the only way I know. If he had signed his name “John Smith,” I would know he was John Smith. That is the only way I know Woo Wai—when he signed on my register [90—3] on the 26th day of October, 1908. I say now to this jury I would be able to recognize these signatures on the railroad tickets dated the 10th day of October, 1910, two years afterwards if they would be similar. I have not compared them as a handwriting expert. I have compared them by knowing the signature—seeing their signature. I seen the signature—I didn’t see it signed more than once, but I have seen the signa-

(Testimony of K. C. Lanier.)

ture since then, at my hotel. I have the book here. The signature is there and I looked at the register more than once. After the 26th day of October, 1908, I saw that signature again on October 27th. My register became filled this month—it is a loose-leaf register. We put it away the second month.

Mr. CAMPBELL.—Q. Do you remember who paid the bill? A. Mr. Roy did the transaction.

Redirect Examination.

(By Mr. STEWART.)

I cannot be positive of who did pay the bill. I have it down on the books as Roy paying the bill. Since I found the register from among my files, in response to your subpoena last year, I have examined the register, and studied it several times since.

[Testimony of Pedro Valenzuela, for the Government.]

PEDRO VALENZUELA, being called and sworn as a witness on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. STEWART.)

My full name is Pedro Valenzuela. I reside at San Diego. My occupation is anything that I can get. I am a workingman—laborer. I am a Mexican. I have resided in Mexico. I was residing in Tecate, Mexico, in November, 1910. I am acquainted with Lerdo Gonzales and with Rosario Siaz.

[91—4]

It was admitted that those are the names of the

(Testimony of Pedro Valenzuela.)

two other alleged conspirators who are not on trial, that this witness has pleaded "guilty" to this charge. He is named in the indictment as "Tomas Valenzuela."

The WITNESS.—The photograph which you show me is the photograph of Lerdo Gonzales. Another photograph which you show me, being a front view and side view of an individual, is the picture of the same person, Lerdo.

The two photographs marked "United States Exhibit No. 7 for Identification."

The WITNESS.—The two other photographs which you now show me are the photographs of Rosario Siaz.

Said photographs were marked "United States Exhibit No. 8 for Identification."

The WITNESS.—In November, 1910, I had eight Chinamen to deal with at that time. My particular part in connection with the Chinamen was buying food—lunch. I was with them many days, I think more than a month. I started from Mexico. From Mexico, I went to San Bernardino, in the United States, with these Chinese. I wasn't very much with them. They might have traveled at night or day time. These two men whose pictures are here were with them—Lerdo Gonzales and Rosario Siaz. Most of the time Gonzales and Siaz were with them. I can't tell what roads they took. We were all three with them when they were brought into San Bernardino. (A number of Chinamen are brought in.) No, sir. I can't identify these Chinese. I was very

(Testimony of Pedro Valenzuela.)

little with them. They are different now. When they came from China they looked different with their dress of Chinese and with their queues on. And now they are fat. I saw them more in the night than I did in the day time. [92—5]

[Testimony of Frederick R. Trimble, for the Government.]

FREDERICK R. TRIMBLE, called on behalf of the United States, testified as follows:

Q. Where did you reside in January, 1911?

A. San Bernardino.

Q. And what was your occupation at that time?

A. I was running a lodging-house for Mr. Cramer & Carver.

Q. What was the name of the lodging-house?

A. The Baldwin Hotel.

Q. Did it have any other local name?

A. It had a name before that; we used to call it the White House.

Q. And that is in San Bernardino?

A. Yes, sir.

Q. What was your position?

A. I was manager for him and running it.

Q. I will ask you to look at the defendants here, the five Chinese sitting inside the rail, Mr. Trimble, and state whether any of them stopped at the Baldwin Hotel, or the White House lodging-house in San Bernardino, in January, 1911.

Mr. CAMPBELL.—Of course, I don't want to take up the time of the Court or my own or your Honor's, but may it be understood that the objection which

(Testimony of Frederick R. Trimble.)

I have made and upon which your Honor ruled on yesterday may run through and to all of this particular testimony of that which happened.

The COURT.—You mean the objection that it was after the accomplishment of the—

Mr. CAMPBELL.—Yes, sir.

The COURT.—Oh, yes; certainly. The fact is that any further objection on that ground is wholly unnecessary, because you are not required to repeat the same objection over and over. [93—6]

Mr. CAMPBELL.—I think not, but there was some question in my own mind. Of course, under the State practice we would not have to do it, but whether or not we have adopted all of the State practice.

The COURT.—Oh, the proceedings are very largely analogous to those of the State. But that is a rule that is well understood. You have exhausted your efforts to exclude such testimony. Now, if it is admitted further you are not deemed to have waived it at all.

Mr. CAMPBELL.—Thank you.

The COURT.—But it may all be deemed objected to, and an exception. (Last question read by reporter.)

A. Yes, sir, the two there.

Q. (By Mr. STEWART.) Will you indicate which two?

A. The second one here and the first one over there.

The COURT.—What is the name of the second one?

(Testimony of Frederick R. Trimble.)

Mr. STEWART.—Wong Wing Sai, I believe, and Wong Chung.

Mr. CAMPBELL.—Yes, Wong Wing Sai and Wong Chung are the ones he has indicated.

Witness further testified that on the 10th January, 1911, the defendant Wong Wing Sai registered at the lodging-house and wrote some Chinese characters in the register. The witness saw a hand grip which Wong Wing Sai left in the office for safekeeping, and as Wong Wing Sai opened the grip, the witness saw a black Colt's revolver with a long barrel. That the day the defendants left the lodging-house the witness found in their room little bits of crumbs of crackers and orange peeling. The room had been cleaned out before the Chinese occupied it.

The attorney for the United States had the register marked for identification and stated that he would refer to it only for [94—7] the purpose of getting in those entries concerning which the witness had testified to.

It was here understood and agreed between the United States Attorney and counsel for defendants that all evidence of acts or declarations of the defendants or of any of the conspirators or of their accomplices or assistants done or made after the entry of the Chinese laborers into the United States would be deemed subject to the same objection, and objected to by the defendants on the same grounds, and defendants' objections overruled by the Court, and exceptions to such rulings taken by the defendants.

[Testimony of Chan Kiu Sin, for the Government.]

CHAN KIU SIN, a Chinese interpreter and translator, called on behalf of the United States, testified that the Chinese characters in the register marked for identification and concerning which the witness, Trimble, testified, meant, when translated into English "Chinese dwelling," "for Chinamen to go"; "foreign devil boy," "Ah Bow." Ah Bow is commonly known as a fictitious name.

[Testimony of L. C. Morton, for the Government.]

L. C. MORTON, called on behalf of the United States, testified:

I reside in Los Angeles. My occupation is Traveling Passenger Agent of the Santa Fe Railroad. In September, 1910, I resided at Redlands, California. At that time I was ticket agent for the Santa Fe Railroad. I saw the defendant, Wong Wing Sai, on September 7th, 1910, at Redlands. The papers you show me are portions of tickets to San Francisco by the Santa Fe Railroad from Redlands, California. They were purchased on September 7th, 1910, about 9 o'clock, P. M. I sold them to the defendant, Wong Wing Sai. There are seven tickets there. These tickets were sold late at night, and I was not the nightman, but the nightman [95—8] wanted to go off, and, consequently, I agreed to take his place. So I went down to the depot and these tickets were called for. My recollection is that he called in the evening and inquired for the price, along about seven o'clock, from me. I returned back thinking I was going to put that number of people out early, for he

(Testimony of L. C. Morton.)

had asked me the price of so many tickets for San Francisco, and I returned early on account of the fact that I thought I would have that number out, and I knew that I would have a lot of baggage to check, as our baggageman was also off at that hour. I sold him the tickets, I think, near nine o'clock. I would not say positively, but nearly that. Anyway, I opened the baggage-room and went out and turned on the lights. I found no baggage. At that time the train connecting with trains for San Francisco left Redlands at 9:20 P. M. The defendant, Wong Wing Sai, did not state at that time what kind of people were going to ride on those tickets. I do not remember any further conversation I had with him.

The seven tickets were marked as one exhibit, "United States Exhibit 9 for Identification."

I did not see Wong Wing Sai after that. I did not see him aboard the train.

Q. (By Mr. STEWART.) I will ask you whether or not you can state from an examination of those tickets and from your experience as a ticket auditor, whether they have been used and ridden on.

Mr. CAMPBELL.—That I object to, if your Honor please, as a conclusion.

Mr. STEWART.—Examine the punches and other marks.

The COURT.—Can you state, he asks you, whether the tickets had been used for the purpose for which they were issued, that is, [96—9] as a means of transportation? Don't state whether they have or

(Testimony of L. C. Morton.)

not; he simply asks you whether you can, from your experience.

A. I can.

The COURT.—Now, what is your objection?

Mr. CAMPBELL.—That it is incompetent, irrelevant and immaterial and he is drawing his conclusion from something else; and the main objection, if your Honor please, is that it is not relevant or material to this case. It brings us back to the proposition that all that was done was done within the State of California.

The COURT.—Well, I have already ruled upon that.

Mr. CAMPBELL.—Yes, but I want to state the objection. All that was done was done within the State of California, and there is no law, federal law, against one Chinaman, assuming that they were brought in, taking them from Redlands to San Francisco.

Mr. CAMPBELL.—I am basing it on the ground that if there was any conspiracy it must have been ended at the time—

The COURT.—Well, I say that objection I ruled on yesterday.

Mr. CAMPBELL.—Yes, your Honor ruled upon that yesterday.

The COURT.—The objection here will be overruled.

Mr. CAMPBELL.—And an exception.

Q. (By Mr. STEWART.) Now, state whether they have been used for transportation.

A. They have.

[Testimony of N. G. Cramer, for the Government.]

N. G. CRAMER, called on behalf of the United States, testified as follows:

Q. Do you know the defendant Wong Wing Sai, the second man? A. I have seen him.

Q. Where have you seen him? [97—10]

A. In a place called the "White House" in San Bernardino.

Q. When was that?

A. That was in the last year; along about the 11th of March; the 11th or 12th.

Q. What month?

A. The 11th or 12th of March.

Q. (By Mr. CAMPBELL.) The 11th or 12th of March last year?

A. No, it wasn't that. It was last year in January.

Q. (By Mr. STEWART.) January, 1911? Do you recognize any other of the five Chinese sitting at the rail as persons you saw at San Bernardino at the same time?

A. I think I seen that third man there.

Mr. CAMPBELL.—Indicating Wong Chung.

Q. (By Mr. STEWART.) Did you have any conversation with him?

A. I was showing the house to some people to sell it, and I ran into him, it seemed like, and I asked him who he was and he said he was a Chinese doctor—

Mr. CAMPBELL.—Wait one moment. We object to that as incompetent, irrelevant and immate-

(Testimony of N. G. Cramer.)

rial. And the additional objection that it is after the entire conspiracy had ended, according now to the testimony of the Mexican.

Mr. STEWART.—That is competent even after the conspiracy is consummated as to that defendant.

The COURT.—It is competent as to him, but not as to the others.

Mr. STEWART.—But as to him it would be competent.

Mr. CAMPBELL.—If it was material, yes. If they show him there committing this crime.

The COURT.—That is what I mean; that it would be competent as to him. I will hear it. I can't tell now whether it is material or not. [98—11]

Mr. CAMPBELL.—Exception.

Q. (By Mr. STEWART.) Go ahead and relate the whole conversation.

A. First I recognized him in my mind as being a man who was there previous to that time, about ten years ago, when I stopped in another house, and I used to know this fellow, and I stopped and spoke to him and asked, "Are you a Chinese doctor?" and he went on and said what he was.

By the COURT.—What did he say he was?

A. He said he was a Chinese doctor. We passed the time of the day and I asked how everything was and he said all right. I thought it was a man that was in our town a number of years before. I had not seen him for a number of years. And I passed a little more conversation with him and these people came up and he *must* down the hall and we looked

(Testimony of N. G. Cramer.)

into the room. That is about all I seen of him. And I went downstairs and he was standing in that office.

The WITNESS.—I seen the room. The room had been soiled quite a bit. In the room I saw some paper bags. It was littered up with bags, and it looked as though there were things in there such as crackers and bread. A man by the name of Fred Trimble was in charge of that lodging-house for me.

**[Testimony of John Birmingham, Jr., for the
Government.]**

JOHN BIRMINGHAM, Jr., a witness called on behalf of the Government, being duly sworn, testified as follows:

My full name is John Birmingham, Jr. I reside at San Francisco. I am a Mechanical Engineer. Last June I was also Deputy Sheriff in Contra Costa County. I arrested the defendant, Wong Yee, in this case, some time after the middle of June, 1911, in Contra Costa County, near the Alameda County line. At that [99—12] time the defendant asked me what he was wanted for. I told him that the Immigration Officer at Angel Island told me he had a warrant for him. He said he wanted to telephone to his attorney. I said that he might telephone after I had telephoned to the Immigration Office that he was under arrest, and he asked me to let him go on the ground of old friendship. He said he had known me a number of years, and didn't think I ought to arrest him. I got the Immigration Office on the phone, and made arrangements to deliver the defendant in San Francisco to Inspector

(Testimony of John Birmingham, Jr.)

Stran. On the way over on the boat he offered me \$500 to let him go. When we got to San Francisco I turned him over to Inspector Stran. I told him he was wanted at the Immigration Office at Angel Island. I did not tell him where the indictment was, or where the case was. I told him that there was a warrant out for his arrest, and the warrant was at Angel Island. I did not tell him what the arrest was for. When he offered me that \$500 to let him go he told me that he was an old friend of mine, and that I might just as well make some money and let him go and say nothing about it. I told him that he would have to go to San Francisco with me, and he could talk to the Immigration people when he saw them; that I had nothing to do with it. I can't remember the exact words that he used in offering me that \$500. As nearly as I can state them, he says: "You have known me for a long while. Now, I have got plenty of money. I will give you \$500, you let me go and say nothing about it." About in those words he spoke to me. I do not remember that there was anything said in that conversation about Los Angeles.

Cross-examination.

(By Mr. CAMPBELL.)

I did not tell him that anything he might say to me might be used against him. I did not tell him not to talk to me. [100—13]

Redirect Examination.

(By Mr. STEWART.)

I didn't promise him anything to talk to me, or

(Testimony of Mar Jick.)

were marked "United States Exhibit 11 for Identification."

The WITNESS.—I made a trip to San Diego. I think it was over a year ago. I left San Francisco with Woo Wai. I was sick, and Woo Wai said, "I want to go to the country," and told me, "Do you want to go?" and I said, "Yes." And afterwards Woo Wai paid for the trip, you know, and went to Los Angeles, and stayed there just a few hours in the evening. I do not know. About two o'clock, or something like that. And Woo Wai would get the tickets to go to San Diego. Afterwards, about seven o'clock, Woo [102—15] Wai told me to buy the bouquet. I got to San Diego in the night, six or seven o'clock. The three railroad tickets on the Atchison, Topeka and Santa Fe Railroad, between Los Angeles and San Diego, which you show me, are the three tickets that we went to San Diego on. There is a man of the Quen family who traveled on the third ticket. I don't remember his name. I don't know where he is now. Woo Wai bought and paid for those tickets. The words, "Woo Wai," written on those tickets are the signatures of Woo Wai, and are in Woo Wai's handwriting. I saw him write them at San Diego. That is the validation on the back—as being return tickets.

Said three exhibits offered in evidence and marked "United States Exhibits 2, 3 and 4."

The WITNESS.—After we got to San Diego I didn't buy the bouquet. Woo Wai went and bought it; I went along. I don't remember the place where

(Testimony of Mar Jick.)

the bouquet was purchased. Afterwards Woo Wai and I took a car to a place a far distance off. We went to Conklin's house. After we went into the house we were ushered into the parlor, where I held the bouquet, and Mr. Conklin told me to be seated in the parlor, and he went upstairs with Woo Wai. I was alone in the parlor downstairs. I held the bouquet, and while we were waiting there a lady came in to the piano and I handed the bouquet to her. I remained in Mr. Conklin's parlor while he and Woo Wai were upstairs—about three-quarters of an hour. Then Mr. Conklin asked me to go upstairs, and I went up and saw an American man,—a kind of slim, short, small man.

Mr. CAMPBELL.—We will stipulate that the man they met up there was Mr. Conklin and Mr. Weddle. Now, I will give you a stipulation as to the time, if you want it.

The WITNESS.—After I was called upstairs and found Mr. Conklin and Mr. Weddle in the room, nothing more was said. I [103—16] was introduced by Woo Wai. He said, "This is Mar Jick." At that time I did not know whether Mr. Conklin and Mr. Weddle were officers of the Government. I had never met either Mr. Conklin or Mr. Weddle before. I didn't see any money in that room on Mr. Conklin when I was called into it. I don't know what I was taken upstairs for, except to see or meet the two white men. I remained only about two or three minutes in the room with Woo Wai, Mr. Conklin and Mr. Weddle. My intention was to go down

(Testimony of Mar Jick.)

to Los Angeles. When I got down here Woo Wai asked me to go to San Diego with him. I did not know at that time, or at any other time during that trip, what his business was at San Diego. Quon, the man who traveled on the third round trip ticket, stayed in the lodging-house while Woo Wai and I went up to Mr. Conklin's house. He was told by Woo Wai to watch over the outfits which we had, such as suitcases. After the occasion I have just testified about, the occasion at San Diego, I saw Mr. Conklin in San Francisco. It was at the time this letter was written that I first testified about when I was first called on the stand, the same day. I first saw Mr. Conklin in San Francisco on that occasion in Jack's restaurant, on Sacramento Street, between Kearney and Montgomery. When we went into the restaurant and went into the room or booth, Mr. Conklin was there first. The others present were Woo Wai and I,—three of us. I attended the dinner at the invitation of Woo Wai. When he notified me he said, "Come to dinner"; and he didn't tell me who was going to be there. I saw Mr. Conklin there only after I got there. Woo Wai paid for the dinner. There was no conversation during the dinner except when we finished, and then Mr. Conklin said it was a very good dinner. There was some talk during the dinner, but I didn't pay any attention to it. After I came out from that restaurant, I [104—17] think Mr. Conklin went down toward Montgomery Street, and Woo Wai and I went to Woo Wai's house, in Clay Street. I do not remember the

(Testimony of Mar Jick.)

number, but it was below Kearney Street. I remained at Woo Wai's house only a short time, I think about ten or more minutes. At that time Woo Wai said, "Do you know anybody down in Ensenada?" I said I did not know anybody down in Ensenada except one Mar Luck. Then I went out to my store. I saw Woo Wai and Mr. Conklin again that day at Woo Wai's house. I returned there by request of Woo Wai. He asked me to write a letter to Mar Luck. At that time I was in his house—that was the second time. I did not know Mr. Conklin was an officer until after I finished the writing. That is the letter was handed to him; I was told he was. In Woo Wai's house, after I learned that he was an officer I think now that it is wrong, so I asked for the return of the letter I had written, and Mr. Conklin refused to give it up. Then I told Woo Wai, and asked him for the return of the letter. Woo Wai said: "Well, let it go," and then Mr. Conklin said, "That is all right; that is all right." I told Woo Wai several times to write to Mr. Conklin for the return of that letter, and Woo Wai told me that he would write to him.

Once in a while I have seen Woo Wai sign checks in his store. He would sign them in English. In that way I have become acquainted with his writing.

The letter you show me, dated "San Francisco, August 22d, 1910," is in Woo Wai's handwriting. The paper you show me, dated "San Francisco, September 8th, 1910," is also in Woo Wai's handwriting.

The two documents were marked "United States

(Testimony of Mar Jick.)

Exhibits 12 and 13 respectively for Identification.”
[105—18]

The WITNESS.—In the letter you show me, dated “San Francisco, October 5th, 1910,” I cannot very well discern the body of the letter, but I know the handwriting of the “W.” That is Woo Wai’s.

Said letter marked “United States Exhibit 14 for Identification.”

The WITNESS.—In the letter you show me dated “San Francisco, November 23d, 1910,” the other parts of the letter I cannot recognize, but the “W.’s” I recognize. The signature “W. W.” is Woo Wai’s.

Said letter marked “United States Exhibit 15 for Identification.”

The WITNESS.—The letter you show me dated “San Francisco, November 24th, 1910,” I think is his handwriting, too, because I recognize the “W” there. I mean the signature.

Letter marked “United States Exhibit 16 for Identification.”

The WITNESS.—In the letter you now show me, dated “San Francisco, December 2d, 1910,” the signature is in Woo Wai’s handwriting.

Said letter marked “United States Exhibit 17 for Identification.”

By Mr. CAMPBELL.—I will probably give you an admission as to those signatures.

Mr. STEWART.—If you think you may, it might save considerable time.

Mr. CAMPBELL.—Certainly, if you will let me look at them. (Letters shown to counsel for defend-

(Testimony of Mar Jick.)

ants.) We admit that that is in his handwriting, your Honor, and have no objection to them being introduced in evidence now. [106—19]

Mr. STEWART.—And the same as to these identified by the witness.

Mr. CAMPBELL.—I have not seen them. Yes, let me see them.

Mr. STEWART.—I think we will just have them identified now. I will name those you have admitted, for the purpose of the record. I will identify them by dates. This is December 15, 1910, postmarked December 16, San Francisco. That is 18.

Letter marked “United States Exhibit 18 for Identification.”

The COURT.—These are admitted to be in his handwriting?

Mr. STEWART.—Yes, and they are being marked for identification; January 5th, 1911, San Francisco,—19.

Letter marked “United States Exhibit 19 for Identification.”

Mr. CAMPBELL.—You are just identifying them now?

The COURT.—He is marking them for identification now, simply. He is not offering them.

Mr. STEWART.—San Francisco, January 6th, 1911,—20, for identification. January 9th, 1911, 21 for identification. January 8th, 1911, 22 for identification. And here is a telegram, Mr. Campbell, admitted to be in the handwriting of Woo Wai, which we ask to be marked 24 for identification.

(Testimony of Mar Jick.)

Mr. DENIS.—What is the date of that?

Mr. STEWART.—January 10th, 1911. That is all.

The foregoing documents, accordingly marked “United States Exhibits 20, 21, 22, 23 and 24, respectively, for identification.”

Cross-examination.

(By Mr. CAMPBELL.)

It was near Christmas, the time when we met in San Francisco. I don't know whether it was before or after Christmas, but I saw Woo Wai buy some Christmas gifts for Mr. Conklin. He gave them to Mr. Conklin.

Woo Wai read the letter that I wrote in Chinese. Woo Wai said “There is no danger.” That was said when Mr. Conklin was [107—20] there. I don't remember anything about a letter being spoken about, or being shown in Jack's restaurant at the time when I found Mr. Conklin there. I don't remember anything about a letter being started to be torn up, and Mr. Conklin taking it and putting it in his pocket. I didn't see any letter torn in the restaurant. I didn't see any letter there at all in the restaurant. At that time Mr. Conklin was in Woo Wai's house I didn't see him write anything.

Woo Wai had paid the premium on the bond in the first instant. Woo Wai didn't pay my expenses down here the first time I came. His wife, who borrowed thirty dollars from others and gave it to me, paid it.

[Testimony of Pete Capdeville, for the Government.]

PETE CAPDEVILLE, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. STEWART.)

That in November and December, 1910, he was employed as a waiter in Jack's restaurant on Sacramento Street, between Montgomery and Kearney. In November, 1910, Conklin came there with defendant, Woo Wai, two or three times for dinner, and two or three weeks afterwards Conklin came into the restaurant and said, he wanted to treat them with a good dinner and asked the price, but he never came back for it.

[Admission Concerning Wong Wing Sai.]

It was here admitted that Wong Wing Sai was in Redlands, September 6, 1910, and there purchased a watch from witness W. C. Guerth.

[Testimony of C. A. Sims, for the Government.]

C. A. SIMS, a witness called on behalf of the United States, testified that in January, 1911, he was a ticket clerk on the [108—21] Santa Fe Railroad, at San Bernardino. On January 11, 1911, at the hour of 9:30 in the morning, he saw the defendants, Wong Wing Sai and Wong Chung, there. The former bought three and the latter two tickets to San Francisco. On that day there were three trains passed through San Bernardino from Los Angeles which connected with trains for San Francisco. One

(Testimony of C. A. Sims.)

left San Bernardino at 11:10 in the morning; one at 4:15 in the afternoon, and one at 10:30 at night. Only one left at night. It was unusual to sell so many tickets for San Francisco to Chinese.

[Admission that W. M. Van Dyke is a U. S. Commissioner, etc.]

It was here admitted that witness W. M. VAN DYKE is a United States Commissioner of this District and that the Chinese, Wong Dom Him, Wong Ging Wee, Wong Ging Foon, Wong Sum, Wong Kum and Quan Bo, were taken before him and were given a hearing in a deportation proceeding under the Chinese exclusion laws, and that after a hearing on the merits the Commissioner found the said Chinese, to be Chinese laborers, and to be Chinese persons, and here in violation of the exclusion act, and that they never had any certificate entitling them to be in the United States.

[Testimony of C. O. Morgan, for the Government.]

C. O. MORGAN, called on behalf of the United States, testified, that in January, 1911, he was a ticket clerk on the Santa Fe railroad. That on the night of January 11th, 1911, the defendant, Wong Wing Sai came to the ticket window, and said he had purchased two tickets that day but was too late for the train, therefore wished to exchange the tickets for others on the Salt Lake Railroad to Barstow. He had two tickets, the numbers of which were 304-A and 303-A. The witness identified United States Exhibit 35 as one of the tickets. *Wing Wong Sai*

(Testimony of C. O. Morgan.)

purchased a ticket from the witness, which the witness identified [109—22] as ticket No. 307-A, which was offered in evidence and marked United States Exhibit 37. On the following day Wing Wong Sai came to the window and asked the time of departure of the train, and was told 10:30. Wong Wing Sai had with him the two Chinamen, Wong Ging Wee and Wong Ging Foon, who were witnesses in the same case. The witness at that time saw two officers, D. M. Spitler and Ed. Poppett, there conversing with the Chinese.

[Testimony of D. M. Spitler, for the Government.]

D. M. SPITLER, a witness called on behalf of the United States, testified, that in January, 1911, he was a special officer employed at the Santa Fe Depot at San Bernardino. That on the night of January 11, 1911, he saw the defendant Wong Chung about to board a train; with him were the three young Chinese, Wong Kum, Wong Sum and Wong Dom Him, three witnesses in the case. Shortly after the train pulled out, he saw the defendant, Wong Wing Sai inside the depot. On the night following he saw Wong Wing Sai again, this time with two young Chinese. They were approaching the depot, and as they reached it the young Chinese went inside, but Wong Wing Sai walked on. The witness asked the former if they had their papers, and they answered: "No sabe." He then requested Wong Wing Sai to interpret for him but he *said did* not know those two Chinese and refused. They all boarded the train

(Testimony of D. M. Spitler.)

going towards San Francisco, Wong Wing Sai apart from the others. With the witness was a policeman named Poppett.

[Testimony of Edward Poppett, for the Government.]

EDWARD POPPETT, called on behalf of the United States, testified, that he was a police officer and on the night of January 11, 1911, he saw the defendant, Wong Wing Sai, at the Santa Fe station, where the latter had come to meet the overland train going to Barstow, but reached the station a little late. [110—23] On the following night Poppett saw Wong Wing Sai again, this time with two Chinamen. Poppett had on his uniform and as they saw him they separated. He then spoke to the young Chinese asking them for their papers. They did not appear to understand, and said they were from Los Angeles. Poppett attempted to get Wong Wing Sai to interpret for him but Wong Wing Sai said he didn't know the two Chinese, and the witness could get nothing out of him or them. Later they boarded the Santa Fe train going towards Barstow.

[Testimony of A. H. Mulvane, for the Government.]

A. H. MULVANE, called on behalf of the United States, testified, that on January 11, 1911, he was on duty as Station Master at the Santa Fe Depot, at San Bernardino. About the middle of the day, the defendants Wong Chung and Wong Wing Sai accosted him there and questioned him in regard to the train for San Francisco, and the cost of a ticket there.

[Testimony of Quan Bo, for the Government.]

QUAN BO, one of the Chinese for having conspired to bring whom into the United States the defendants were on trial, was called as a witness on behalf of the United States and testified as follows:

My name is Quan Bo. I was born in China. I am a Chinese person. I came to the United States from Mexico. I kept a saloon in partnership in Mexico. I never had a certificate of residence entitling me to be in the United States. I never had any kind of paper at all that in any way related to my entry into the United States. In Ensenada Wong On offered to get me into the United States for \$300. I was to be taken up to San Francisco, but first to San Bernardino, and then somebody would take me from there on. Wong On did not tell me the names of the persons, [111—25] but he said two of his clansmen will be there at San Bernardino. By his "clansmen" he meant the same family—that is Wong. There were eight Chinamen altogether, including myself, who started from Ensenada. In the party there were three Mexicans, guides. We left Ensenada about the twenty-fourth of November, 1910. We walked in the night-time. During the day we slept and the Mexican guides went away to another place. The photograph which you now show me, being United States Exhibit 7 for identification, is the photograph of one of the Mexican guides. (Said photograph offered in evidence marked United States Exhibit 7, being the photograph which has been identified by the witnesses Valenzuela and Weddle as Lerdo Gonzales.)

(Testimony of Quan Bo.)

When we got to San Bernardino the Mexican showed me the letter and two names appeared on the letter. I knew the names written there. They were Wong Wing Sai and Wong Chung. After we arrived at San Bernardino, the Mexican guide asked me in Spanish to go out to the edge of the city, and go with the other men to take the train.

Q. (By Mr. STEWART.) How long were you and the other Chinese at San Bernardino?

Mr. CAMPBELL.—Of course, we understand that all this testimony is under the general objection which I made at the commencement of the trial.

The COURT.—Yes.

A. Several days.

Witness further testified that he went with one of the Mexicans who had brought them over from Mexico to the edge of the City of San Bernardino. There they met another Chinaman who gave his name as Wong, but the night was dark and rainy, and the witness could not recognize him. The witness asked this [112—26] Chinaman for his name, and he said his name was Wong, and the witness asked him for the other part of his name, and he said, "That will do. You go back there and don't scatter and I will come to you to-morrow."

On cross-examination, the witness testified as follows:

We remained there over two days, in a forest next to San Bernardino. Seeing that nobody came to us, and there was no food for us, and cold, so I went away from the company. I ran away from the company alone.

[Testimony of Wong Ging Wee, for the
Government.]

WONG GING WEE, another of the alleged Chinese contrabands, called on behalf of the United States, testified that he was a Chinese person, born in China. That he was brought with seven other Chinese, including the witness Quon Bo, the witness Wong Ging Foon, who was a cousin of Wong Ging Wee, and the witnesses Wong Dom Him, Wong Sun and Wong Kun, from Ensenada, Mexico, to San Bernardino, in the United States; that he made his arrangements to be brought into the United States at Ensenada with Wong On, who was there engaged in smuggling Chinese into the United States. That Wong On said somebody would receive the party of eight Chinese, of which the witness was one, in the United States. That he was to pay \$150, American money, to Wong On, and \$150, American money, to Wong Wing Sai for bringing him into the United States. That Wong On told him he would meet Wong Wing Sai at San Bernardino, and that Wong Wing Sai would take him from San Bernardino to San Francisco. That Wong Wing Sai would give him work, and when he earned wages he could pay him. That Wong On would send the eight Chinese along by Mexicans, and a letter would be given to one of the Mexicans to the man who would meet them in San Bernardino. He recognized the photograph of Lerdo [113—27]. Gonzales, one of the Mexican guides. They remained in the mountains outside the city of San Bernardino three or four

(Testimony of Wong Ging Wee.)

days and then met the defendant, Wong Wing Sai, who took the witness and Wong Ging Foon to a lodging-house in San Bernardino. During their stay there, Wong Wing Sai brought food to them, and two days later took them to the train. That when Wong Wing Sai started with them from the lodging-house to go to the train he told the witness to say, in case they should meet any Inspectors, that they did not know Wong Wing Sai. It was evening and as they approached the railroad station they were accosted by two Americans, who asked the witness his residence and destination. His answer was, that he had no certificate of residence. Wong Wing Sai gave the witness a railroad ticket, which was introduced as evidence by the attorney for the United States. The Chinese boarded the train for San Francisco, Wong Wing Sai sitting apart from the others. Before the train came in Wong Wing Sai told the witness and Wong Ging Foon that if they were ever caught by the Inspectors they were to say they didn't know Wong Wing Sai, and all the Inspectors would do would be to order them back to a smaller city. Wong Wing Sai told them several times not to tell people they knew him, and to just watch him in order to know when to get on and off the train, and also to get off at Oakland.

The question was asked:

Q. Who got off the train first?

Mr. DENIS.—We will object now to this evidence on the ground that it is incompetent, immaterial and irrelevant—incompetent and immaterial in that the

(Testimony of Wong Ging Wee.)

facts sought to be elicited from this witness at this time were long subsequent to the consummation of the conspiracy.

The COURT.—That, as Mr. Campbell suggested, comes in under that objection. [114—28]

Mr. DENIS.—I only make that objection because I think this is an unnecessary expenditure of valuable time.

The witness further testified, that while on the way they were arrested by Conklin and another Inspector, and both taken to a house in a small town, where they found the defendant Wong Chung. That in said house to which they were taken Wong Wing Sai said to the witness, "Now, we are under arrest. Maybe we are to be taken to Los Angeles or elsewhere, but wherever it may be you just as well acknowledge it, and then they will send you back to China. If you admit we know each other, it may involve your staying here a long time, and you will have to go to jail." All the Chinese were taken to Los Angeles and put in jail. In the jail Wong Wing Sai said to the witness, "Now, we are under arrest, and you had better not say anything. That would be best. If you say anything that you and I know each other and know these doings, it may cause you several years in jail—imprisonment."

[Testimony of Wong Dom Him, for the Government.]

WONG DOM HIM, another of the alleged Chinese contrabands, called on behalf of the United States, testified that he was a Chinese person, born in China,

(Testimony of Wong Dom Him.)

where his occupation was that of a farmer. That he came to the United States to work; that he never had any kind of a paper relating to his entry or remaining in the United States, that he was one of a party of eight Chinese including Wong Ging Wee, Wong Ging Foon, Wong Sun, Wong Kun, Quan Bo, and two others who had, at the time of the trial, been sent back to China, one of whom belonged to the Wong family, and the other to the family of Nim, which started from Ensenada, Mexico, and who were taken by three Mexicans (the photograph of one of whom the witness recognized, as shown in United States Exhibit No. 7), from Ensenada, Mexico, to the United States. [115—29]. That he made similar arrangements with Wong On to those made by Quan Bo. The witness paid Wong On \$200 in Mexican money, and Wong On told the witness that he could pay the balance to Wong Chung after getting over into the United States and earning it. That Wong On told the witness that Wong Chung would meet him at San Bernardino and take charge of him, and take him to San Francisco. When they reached the edge of the city of San Bernardino, he and Wong Sung and Wong Kun were turned over by the Mexicans to the defendant Wong Chung, who took him and the two other Chinese to an old worn-out house. They remained there three days and were then taken by Wong Chung to the railroad station where they boarded a train, Wong Chung sitting apart from the rest. Wong Chung paid for the railroad ticket which was then introduced in evidence,

(Testimony of Wong Dom Him.)

and marked "U. S. Exhibit 35." Wong Chung said to me and the other two boys with me, "We are going to take the train this evening for the city. Don't be afraid." He said: "The Inspectors not here; they are all gone away." He told us to stay in one car and he would stay in another, and for us to get off the train when he did. While on the train they were arrested by Conklin and another Inspector and taken to a lodging-house, and next day to jail. At the lodging-house Wong Chung told us, Wong Kun, Wong Sun and myself, not to admit that he took us along. He said "I have plenty money to spend. If you acknowledge, I will send you to jail for two or three years. If you don't and they deport you to China, I will pay you Four Dollars Mexican money each and get blankets and clothing for you." In the jail he told us not to acknowledge that he took us, and said to us, "If you acknowledge, we will transfer the case to Sacramento to the State Courthouse." [116—30]

[Testimony of Wong Sun, for the Government.]

WONG SUN, another of the alleged Chinese contrabands, called on behalf of the United States, testified that he was one of a party of eight Chinese which came from Ensenada to San Bernardino. He was born in China and came to the United States from Mexico to find work. He made the same arrangements with Wong On in Ensenada as were made by Wong Dom Him, including the payment of money to Wong Chung. Arriving there they were delivered to the defendant, Wong Chung, at night.

(Testimony of Wong Sun.)

Wong Chung then took them to an old house. He gave Wong Sun a railroad ticket, and at night they took the train from San Bernardino, riding in separate cars at first. Wong Chung told them to get off the train where he got off. While on the train they were arrested by Conklin and taken to jail in Los Angeles. After we were arrested Wong Chung told me not to say anything against him. He told me not to say he was the person to guarantee my coming over and that when I was deported to China he would get me four dollars to buy a blanket. In jail he said the same thing to me.

**[Testimony of Wong Ging Foon, for the
Government.]**

WONG GING FOON, another of the alleged Chinese contrabands, called on behalf of the United States, testified that he had made the same arrangements with Wong On in Ensenada as were made by Wong Ging Wee, including the payment of money to Wong Wing Sai. That he was one of a party of eight Chinese boys who were taken by the three Mexicans from Ensenada to San Bernardino, where the witness and Wong Ging Wee were turned over to the defendant Wong Wing Sai, who took them to a lodging-house. There he told us should we ever be arrested, to say we were not acquainted with him, and if we say we know each other, the case will involve a long time. Wong Wing Sai then gave the witness a railroad ticket for San Francisco and at night they boarded a train, Wong [117—31] Wong Sai sitting apart from the others. Next morning at four

(Testimony of Wong Ging Foon.)

o'clock they were arrested on the train by Conklin and by him taken to a lodging-house. There Wong Wing Sai told me not to admit that he was the person to convey me on the way; that if I do, the case may last for a year or so. We were afterwards taken to jail in Los Angeles. There he told me not to say anything against him, and that he would be bailed out in a few days, and he would then bring me coffee, sugar and provisions to the jail.

**[Testimony of Fernando Sanford, for the
Government.]**

FERNANDO SANFORD, a witness on behalf of the United States of America, testified as follows:

That he is a Professor of Physics at Stanford University. That on August 15, 1907, he was appointed confidential agent of the Immigration Commission. His duties were generally to assist Professor Jenks, a Commissioner, in any work to which he chose to assign him. On August 6, 1908, he was put in charge of the investigations of the offenses and violations of the Immigration Laws on the Pacific Coast, in which work he continued until March 1, 1909.

In October, 1908, Sanford, acting in his official capacity, went to San Diego to consult Weddle and Conklin, Customs Inspectors, in regard to a meeting with G. M. Roy and Woo Wai. Roy had been employed in Sanford's presence by Professor Jenks as a detective, to act in connection with Sanford's investigation and reported to him. Sanford knew that Roy was going down to San Diego to introduce Woo Wai to Weddle and Conklin, and to give him an op-

(Testimony of Fernando Sanford.)

portunity to make an offer to bribe them to bring men across the border. At this meeting with Weddle and Conklin, Sanford asked them to appear to acquiesce in this proposition. [118—32]

[Testimony of Harry H. Weddle, for the Government.]

HARRY H. WEDDLE, called on behalf of the United States, being duly sworn, testified as follows:

I have resided at San Diego, California, for about twenty years. Am Inspector in Charge of the Immigration Service of the United States in the District of San Diego, which now comprises San Diego County, and extends up to Santa Ana and Riverside, but during 1908, 1909 and 1910 it took in all of Southern California south of Monterey County, and I was then in charge of all Inspectors operating in that territory up to June 30, 1910. I know Mr. Conklin. He is a Chinese Inspector stationed at San Diego under me, and operates under my direction. I know three of the defendants, Woo Wai, Wong Yee and Wong Chung. I have seen United States Exhibit 5.

Mr. STEWART.—This letter has not been read to the jury. I desire to read it.

Mr. Campbell.—What is the letter?

Mr. STEWART.—Letter of March 31, 1910, United States Exhibit 5.

Mr. CAMPBELL.—I have no objection.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 5—Letter, Dated March 31, 1910—
Woo Wai to Conlan.]

“San Francisco, Mar. 31th, 1910.

Mr. Conlan

My Dear Friend I took train from S. F. friday evening Come Los Angeles Saturday afternoon two o'clock take train Come down San Diego at seven o'clock night April 3 I sent you letter you must in your home wait for me Saturday night from 8 to 9 o'clock want meet you of business G. M. Roy not in city. I with Wong Yee Come he was seeing you before I want you tell Mr. Weddle meet me at you house

You respectfully

WOO WAI.”

The WITNESS.—I first saw that letter when Mr. Conklin brought it to my office (in San Diego),—I think the 1st or 2d of April. I don't know the day of the week. [119—33]

After receiving that letter I went to Mr. Conklin's house that evening about 7:30 and waited for Woo Wai, Wong Yee and Wong Chung. We had a conversation, all five being present in Mr. Conklin's private room on the second story of Mr. Conklin's house. When Mr. Conklin brought the three gentlemen to the room Woo Wai and all of them said, “How do you do,” and shook my hand. Then Woo Wai said they were ready to go ahead with the offer that they previously made us, which was \$50 apiece for all Chinese that passed from Mexico through our district in safety to their destination. Woo Wai said he came down there because he could no longer do busi-

(Testimony of Harry H. Weddle.)

ness in San Francisco because a new man named Watts had been recently appointed in San Francisco. Wong Yee then said that he was going [120—34] to Ensenada to make arrangements with a Chinese merchant there to act as receiving and forwarding agent for Chinese coolies that they expected to bring into this country. Woo Wai said his private mark was H. S. W. W., and that any correspondence we received so signed would be all right. I then told him that I would move the Inspectors into a different part of the district when bunches of Chinamen were coming through. This he had requested in our previous interview.

Q. (By Mr. STEWART.) When was the last previous conversation you had with any of them?

A. I had a conversation with Wong Yee on December 19, 1908, at Inspector Conklin's house, in the same room. Wong Yee said he had made arrangements with a Chinese merchant at Ensenada to act as their agent, and that a bunch of Chinamen would soon come through. That was in December, 1908. He said that the trip from Tia Juana to Ensenada, and from Ensenada to Tia Juana was a hard trip, and that the Chinamen were not anxious to travel over land in the winter time. They wanted to wait until the weather was warmer. I had a previous conversation with Wong Yee on the morning of November 17, 1908. He came to get permission to go to Ensenada and return. I had to refuse him permission, as he did not have proper papers. I later allowed him to go because of a telegram from the

(Testimony of Harry H. Weddle.)

Secretary of Commerce and Labor. The telegram introduced in evidence is marked "United States Exhibit No. 26."

Professor Sanford was a Special Agent of the Immigration Commission, and his work was to investigate violations of the Chinese Exclusion laws in the Western part of the United States, from the Mexican border to the State of Washington. I know that the telegram referred to [121—35]. Wong Yee because I received a letter from Professor Sanford—

Mr. CAMPBELL.—We object to that.

Mr. STEWART.—We have the letter.

Mr. CAMPBELL.—I withdraw the objection on the suggestion of my associate. I would like to have the letter read into the record.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 27—Letter, Dated December 2, 1908—Sanford to Conklin.]

"Fairmount Hotel, San Francisco,

Under Management of Palace Hotel Company.

Dec. 2, 1908.

Dear Conklin I have seen our friend since his return, and I think we will make matters all right yet. If someone else comes down there, tell Weddle to let them through anyway. I suppose he has received the telegram from Sec Straus concerning Hoo Wai. The secretary wired me that he would instruct him to let him pass. I will stand the responsibility of your letting another man through if necessary. Use him yourself for all he is worth.

(Testimony of Harry H. Weddle.)

I have heard from Washington today that the collector will be agreed upon tomorrow evening. Ballow is likely to get it I think. Allen recommended him and said Ward would agree to him. I think he will help you all he can if he goes in, and Todd will be safe.

I hope you will get Keno and Todd if he wants to change; but he must not be forced out. I hope we may have some good news for you before long. If matters go as I hope they will, we can give you lots of help.

Hoo Wai says the inspector in charge at El Paso is a bad man. He will do business with only one Chinaman; but the other inspectors do business with anybody.

With best regards to Weddle and Agard,

Yours sincerely,

FERNANDO SANFORD." [122—36]

The letter was introduced in evidence, and marked "United States Exhibit No. 27."

The WITNESS.—Professor Sanford was also a professor at Stanford University—physics, I believe. Keno and Todd mentioned in the letter, were Keno Wilson, Chief of Police of San Diego, and Mr. Todd, was former Customs Inspector.

I had a talk on November 16th, 1908, with *Woo Wai*, *Wong Chung* and *Wong Yee* at Inspector Conklin's house. I went there because of the letter I received from Professor Sanford. When I went into the room *Woo Wai* got up and said "How do you do," shook my hand, and introduced me to *Wong Yee* and *Wong Chung*, who, he said, were his busi-

(Testimony of Harry H. Weddle.)

ness partners, and trustworthy men. That was the first time I ever saw Wong Yee and Wong Chung. Woo Wai then said they called to make an offer to Inspector Conklin and myself of \$50 apiece for all contraband Chinese who passed through our district from Mexico safely to their destination, and he requested us to move the inspectors where they would be away from the point at which the coolies would cross the line, and under instructions, I assented to this. Wong Yee said the best place for Chinamen coming from Ensenada, Mexico, to take the train for San Francisco would be at Burbank, near Los Angeles. He said the station wasn't near the houses in the town, and that he had friends who had come in that manner. Wong Chung also said that that would be a good place to have the Chinamen take the train. Woo Wai said that Burbank was not the place, but that Orange, Cal., would be a proper place for Chinese to come from Mexico to take the train, as it was farther from Los Angeles, and inspectors stationed at Los Angeles would not be so apt [123—37] to hear of Chinamen taking the train there. He said he would secure a Chinese merchant at Orange to act as his agent there. Wong Yee then said he would come down to the Immigration Office the following morning in order to go to Ensenada, Mexico, to secure a Chinese merchant there to act as their agent. Then Woo Wai stated that his private mark was H. S. W. W., and any correspondence we received that way would be all right, and would come from him. I first saw Woo Wai at the Immigration Office on the evening of October 26, 1908.

(Testimony of Harry H. Weddle.)

Inspector Conklin and a man named G. M. Roy were present. I was in the office when Woo Wai, Roy and Conklin arrived. Roy introduced me to Woo Wai. Woo Wai said that he had a business proposition to offer, and then he said that if we would allow Chinese to come from Mexico and pass in safety through our district, that he would pay us \$50 apiece upon their safe arrival at their destination. Acting under orders, we assented.

I have seen the letter dated August 22, 1910, marked "United States Exhibit No. 12" for Identification. Inspector Conklin brought it to me shortly after he received it.

Mr. STEWART.—This letter is as follows (reading):

[U. S. Exhibit No. 12—Letter, Dated August 22, 1910—H. S. W. W. to Conklin.]

"San Francisco, Aug. 22th, 1910.

Mr R L Conklin Six men Come from San Diego to Redland please take Care for Them. Mr Roy in New York until six men Come City I will send up to you.

H S W W

Some more Come after I will send you letter."

Envelop: "R L. Conklin 860 21th St. San Diego, Cal."

Mr. STEWART.—This envelope bears the postmark, San Francisco, August 23, 3:30 A. M. [124—38]

(Letter and envelope marked "United States Exhibit No. 12.")

(Testimony of Harry H. Weddle.)

The WITNESS.—That is the first notice in writing I had from any of these defendants about Chinese coming into the United States.

Q. (By Mr. STEWART.) What did you do, if anything, upon first seeing that letter?

A. I directed all our inspectors to watch the line very closely.

I have seen the letter marked “United States Exhibit No. 13” for identification. Inspector Conklin brought it to me as soon as he received it. He was under instruction to bring all correspondence to me.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 13—Letter, Dated September 8, 1910, to R. L. Conklin.]

“San Francisco Sept. 8th, 1910.

R L Conklin. 6 pkg Come in City tonight no trouble. H S W W Some more Come after I will send you a letter.”

(Said letter is marked United States Exhibit No. 13.)

The WITNESS.—I saw the letter postmarked “San Francisco, October 5, 1910,” dated same day, marked “United States Exhibit No. 14” for identification. Mr. Conklin brought it to me.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 14—Letter, Dated October 5, 1910—H. S. W. W. to Conklin.]

“San Francisco Oct 5th 1910.

Mr R L Conklin.

My Dear Friend I ought Come down see you several weeks ago because I am sick Cannot come

(Testimony of Harry H. Weddle.)

very Sorry for that I will sure Come Friday evening seven o'clock train October 7th 1910 I arrive San Diego Saturday night at seven o'clock Oct 8th 1910 you must in home wait for me until I Come don't disappoint me get Mr. Weddle Come you house I want see you both.

Your Respectfully

H S W W."

(Marked United States Exhibit No. 14.)

The WITNESS.—I think I saw this letter the 7th or 8th of October. I saw Woo Wai and Mar Jick at Inspector Conklin's [125—39] house about 7:30 in the evening of October 8th. That was the first time I ever saw Mar Jick. At first, Conklin, Woo Wai and myself were present, and Woo Wai said that his men had arrived from Ensenada, Mexico, in Oakland safely; that they were placed in the basement of Wong Chung's store at 620 Harrison Street, Oakland, until they recovered from their footsore condition; that they had been brought from Redlands, California, on the Santa Fe by a man he had sent out from San Francisco; that these Chinamen had paid him \$280 apiece to be brought into the United States; that out of this sum his agent at Redlands had paid the Mexican bodyguard who brought the Chinamen from Ensenada, Mexico, to Redlands \$120 and had given the Mexican \$6 apiece for each Chinaman for food en route from Ensenada, Mexico, to Redlands; that there were thirteen—that the railroad fare from Redlands to Oakland was \$13 apiece about; that he paid \$50 to his agent at Redlands for each Chinaman, and that if he paid \$50 to Inspector

(Testimony of Harry H. Weddle.)

Conklin and myself, with the expenses of the guide from San Francisco to Redlands and return, his profit would be but \$34 per man. He said that the Chinese had taken twenty-two days from Ensenada to Redlands; that a few days before they arrived at Redlands three of the Chinamen played out, and the Mexican bodyguard hired a rig to haul them into Redlands, and requested pay for this, but it was refused him; that three days after the Chinamen and their guide left Redlands, the store at which they had been secreted there was raided by inspectors.

I think we received the letter marked Exhibit 12, dated August 22d some time the first part of September, 1910. The letter went to Conklin's house at San Diego, when Conklin was stationed at Chula Vista, and he didn't [126—40] get his mail for some time. The inspectors who raided the Chinese store at Redlands were sent out on my request. Conklin stated to Woo Wai that in order to be fair we would split the difference between the \$50 we were to receive and the \$34 he would have, and we would each receive \$42 a head. Woo Wai then placed \$300 in gold on the table, and not having any change we returned Woo Wai \$50 in gold in \$5 gold pieces. After Woo Wai left Conklin and I put the money in a purse and then put it in an envelope, sealed the envelope in four places, and stamped the seals with the letter "E." The seals have never been broken. I identify the envelope you show me as the one just testified to. The envelope, purse and money, introduced in evidence, and marked "United

(Testimony of Harry H. Weddle.)

States Exhibit No. 28."

We had some further conversation. Woo Wai stated that he had been sick and not able to come down as soon as he expected. He said that A. W. Hall in San Francisco was bringing in Chinese by water, and that he brought in between four and five hundred Chinese in the previous year, and unless we caught him we would be unable to do any business. He said he would get information that might enable us to catch Hall; that it was necessary for us to do so before much more business could be done. We told him that we were anxious to get any evidence against any Chinese smugglers that we could; that we wanted to get it. Then Woo Wai said he had a friend downstairs that he wished to bring up and introduce, and he motioned at the money lying on the table, and Inspector Conklin covered it with a newspaper. Then Conklin and Woo Wai went down and brought Mar Jick back. Woo Wai introduced me to Mar Jick as a friend [127—41] of his and a very reliable man.

I know Lerdo Gonzales, and recognize United States Exhibit 7 for identification as photographs of him. I know Rosario Siaz, and recognize United States Exhibit 8 for Identification as photographs of him. In November, 1910, and December, 1910, I detailed Mr. Conklin to go to San Francisco to pursue the investigation in this case.

Cross-examination.

(By Mr. CAMPBELL.)

I know William R. Wheeler. He got my appoint-

(Testimony of Harry H. Weddle.)

ment for me. I met G. M. Roy once; met him at the Immigration office in San Diego on October 26, 1908. I do not know what business he was in before that time. No one introduced me to Roy, and at that time I didn't know he was Roy.

Acting under instructions of Professor Sanford and Mr. Wheeler, the Assistant Secretary of Immigration, I listened to what Woo Wai had to say. I didn't know Woo Wai was coming; I knew a man was coming. Professor Sanford wrote me that a man was coming. He told me to apparently consent to what this man suggested. I don't know whether Professor Sanford knew what the man was coming for. I didn't intend to trap the man. I don't know what relation Mr. Roy had with Professor Sanford, nor do I know Roy's business. I know by newspaper reports that he was a detective in San Francisco. I didn't know it at the time. I don't know where he is now.

Q. (By Mr. CAMPBELL.) Is that the information you got from Professor Sanford? (Referring to a telegram.)

A. That, and the verbal instructions from him.

Q. And this one dated October 25—the one dated [128—42] October 24th you say you received?

A. Yes, sir.

Mr. CAMPBELL.—I offer that in evidence in connection with the cross-examination.

Mr. STEWART.—I believe one of the defendants is absent.

The COURT.—The defendants have no right to

(Testimony of Harry H. Weddle.)

depart from this courtroom. Counsel must instruct their defendants, or I will see that they are in charge of the marshal. Of course, I believe he did it inadvertently, but I wouldn't want any error to get into the case when we are not aware of it.

Mr. STEWART.—I think this testimony should be gone over again.

Mr. CAMPBELL.—How long was he out?

Mr. SOOY.—About two minutes. (After asking defendant a question.)

Mr. STEWART.—I suggest that the reporter read the testimony to him.

Mr. CAMPBELL.—We consent that he never was out.

The COURT.—Well, it does not appear on the record—well, it does appear?

The REPORTER.—It does appear now, your Honor.

The COURT.—I am satisfied he did not intend to go out. They should be made distinctly to understand that they must not depart from the courtroom. They were sitting there together and they are liable to go out without attracting my attention.

Mr. CAMPBELL.—You must not go out at all. When you want to go out, speak to us and we will ask the Court to let you go. You have no right to go out of the courthouse at all till court adjourns.

Mr. STEWART.—Will you read what transpired since? [129—43]

The COURT.—Tell them if any of them want to go out the Court will be ready to permit them.

(Testimony of Harry H. Weddle.)

The reporter hereupon reads the testimony sufficient to cover the time of the absence of the defendant from the courtroom.

Mr. CAMPBELL.—(Reading:)

**[Defendants' Exhibit "A"—Telegram, Dated
October 24, 1908—Sanford to Weddle.]**

“Palo Alto, Calif., Oct. 24, 1908.

H. H. Weddle, U. S. Immigration Office, San Diego,
Cal.

Parties will leave Monday evening the twenty-sixth.

SANFORD.”

(Telegram marked Defendants' Exhibit “A.”)

Mr. WEDDLE.—I received the telegram the 24th or 25th; I think the 24th. I did not know what parties were coming. Professor Sanford told me in a previous interview that he wished to get certain information regarding San Francisco, and any party that came down to see me and interview me, to apparently consent to any offer they made. I told him at that time I would not do anything to break the law, but would apparently consent. I never intended to break the laws, nor to enter into any conspiracy with Woo Wai or anybody else to break the law. All I wanted was to find out what they wanted to do, and I followed it subsequently for the purpose of trying to arrest them. That was not my intention from the start, as I thought Professor Sanford wanted to get certain information from Woo Wai and wanted to get a hold on Woo Wai to get that information.

(Testimony of Harry H. Weddle.)

Q. And Professor Sanford wanted to get information in relation to Dr. Gardner and Mr. North of the Immigration Commission in San Francisco?

A. He didn't tell me that.

Q. The immigration officers there?

A. People connected with the immigration offices. He didn't say who. I believe he wanted a hold on Woo Wai to make Woo Wai tell him those things.
[130—44]

Q. And that is the purpose for which you entered into all those things?

A. That was the first part; yes.

I received the telegram dated October 25th in due course; the day before Mr. Roy and Woo Wai came down there.

Mr. CAMPBELL.—I will offer that in evidence, and have it marked Defendants' Exhibit "B."

Mr. CAMPBELL.—(Reading:)

**[Defendants' Exhibit "B"—Telegram, Dated
October 25—Sanford to Weddle.]**

"Palo Alto, Cal., Oct. 25.

H. H. Weddle, Immigration Office, San Diego, Cal.

Party will call Conklin's home tomorrow Monday evening please be within reach.

SANFORD."

I first saw Roy and Woo Wai at the Immigration Office with Mr. Conklin, on the 26th of October, 1908. Roy introduced me to Woo Wai, saying, "This is my friend." I was not a friend of his; never saw him before, and didn't know him. I did not contradict him. We apparently accepted Woo Wai's offer of

(Testimony of Harry H. Weddle.)

\$50 for every Chinaman that came into the United States across the border. We didn't intend to take it, or to let any Chinaman come across the border, but were doing that for the purpose of getting a hold on Woo Wai to find out something that he knew. The \$50 was to be divided between Conklin and myself. Roy didn't say that he was to get any portion of it. I saw Woo Wai again November 16th, 1908, in Mr. Conklin's house with Wong Yee and Wong Chung, where he made the same offer again. We apparently agreed to it. I did not see Woo Wai again until April 2d, 1910, and had no communication with him except on December 28, 1908, when we received some Christmas presents from him. We received presents on one other occasion, and kept them for the purpose of bringing them in as evidence. I never sent him any presents, nor do I know of Mr. Conklin sending him presents. The letters Mr. Conklin received [131—45] from Woo Wai he turned over to me. I saw one or two of the letters he wrote to Woo Wai; I don't know how many he wrote. Mr. Conklin was acting under my instructions. We were not making any investigation for Mr. Sanford between December, 1908, and March, 1910. I was acting under Professor Sanford's instructions in 1908. In March, 1910, I was acting under the verbal instructions of the Assistant Secretary of Commerce and Labor and the Commissioner General, to follow out the clue made by Woo Wai's offer that there was smuggling going on. We were instructed by William R. Wheeler and the Com-

(Testimony of Harry H. Weddle.)

missioner General in a talk that if Woo Wai renewed his offer we were apparently to continue to accept it. This was in the fore part of 1909. Mr. Wheeler said he didn't believe anything further would be done by Woo Wai.

Q. (By Mr. CAMPBELL.) He didn't believe anything further would be done by Woo Wai? And you haven't any idea, as you said there, Mr. Witness, how it came that Woo Wai on the 31st day of March, 1910, wrote a letter to Mr. Conklin, have you? A. Yes, sir.

Q. How?

A. Because he wanted to smuggle Chinese.

Q. He wanted to smuggle Chinese in 1908, didn't he? A. Yes, sir.

Q. But he did not smuggle any Chinese from December, 1908, to March, 1909, to your knowledge?

A. Not to my knowledge.

Q. That is what I want to find out. How do you know, or do you know, how it was that after having had a conversation with you in 1908, in the latter part, say in December, that the thing was allowed to sleep until March, 1910, and all at once wake up again? [132—46]

A. Woo Wai explained that in his visit of April 2d, 1910.

Q. What did he say?

A. He said he could no longer do business in San Francisco because there was a new man there named Watts.

Q. Don't you know he never did business in San

(Testimony of Harry H. Weddle.)

San Francisco? A. No, sir.

Q. Do you know that he did? A. No, sir.

Q. Whom did he tell that to?

A. To me and Inspector Conklin, in Conklin's house in the presence of Wong Yee and Wong Chung, in April, 1910.

Q. But you don't know why he wrote this letter on March 31, 1910, do you?

A. I have just stated that he explained why. All he said was that he couldn't do business any more in San Francisco. I don't understand what he meant in the letter of March 31, 1910, by "G. M. Roy not in the city." Mr. Roy had nothing more to do with his business after I saw him in 1908 that I know of. He came down and met Inspector Conklin in November, 1908, in Los Angeles.

Q. (By Mr. CAMPBELL.) Oh, before he came down with Woo Wai? A. No, sir.

Q. Afterwards again?

A. Yes, sir. I didn't see him after that. I passed Wong Yee across the line in 1908 under instructions of Mr. Straus, Secretary of Commerce and Labor. I think I gave him a card. He said he was going into Mexico for the purpose of getting an agency to ship Chinamen across the border.

Mr. CAMPBELL.—I offer this in evidence.
(Reading:)

(Testimony of Harry H. Weddle.)

[Defendants' Exhibit "C"—Card.]

"Permit Yee King to pass into Mexico & return.

HARRY HEDLEY WEDDLE,

Inspector in Charge."

It is on his card. [133—47]

(Card is marked Defendant's Exhibit "C.")

The WITNESS.—The first letter Professor Sanford wrote me said he had a matter of importance, and he wished to see me. I did not go to see him in answer to the letter, he came to San Diego to see me. He didn't mention anybody's name. He said he was conducting some investigations in San Francisco, and that he wished to get a hold on some one up there, but he didn't tell me his name. After the first meeting with Woo Wai, he told me his name. I knew simply because Woo Wai came that he was the person Mr. Sanford meant. I didn't know anything about Mr. Roy. Roy introduced me as his friend, and Woo Wai said he had a business proposition to make us, and that Roy said we were all right; and then he said if we would allow Chinamen to come through the district, upon their safe arrival at their destination he would pay us \$50 a head for each Chinaman that arrived safely at his destination that passed through our district, and I assented. I don't remember the exact words I used. Mr. Conklin did the same. Mr. Roy didn't say anything about it. I think Inspector Conklin and myself both said there was a good deal of danger to us. Woo Wai didn't say, "I don't know about this; this is dangerous," nor did we say, "No danger at all. We are

(Testimony of Harry H. Weddle.)

the Government.” Nothing of the kind was said in any conversation I ever had with Woo Wai, or that I ever heard. Mr. Roy said, “This is my friend and he is all right.”

Q. What did you understand him to mean when he said you were all right?

A. I suppose it meant I was all right to do business. I reported this conversation to Mr. Sanford at a meeting with him November 14, 1908, at the Alexandria Hotel. Then he told me it was Woo Wai that was coming, and upon whom he wanted to get a [134—48] hold. He said that Woo Wai, from information that he had received, was engaged in importing Chinese prostitutes in San Francisco, and he wished to get a hold on him. He said he had evidence and reports that he was engaged in that business. He wanted to get a hold on him so as to make Woo Wai come through and tell who his confederates were. Neither myself nor anyone under me intended to enter into a conspiracy with anyone to violate the laws of the United States, nor did we intend that Woo Wai or any person should bring any Chinamen across the Mexican border, nor to accept any money from Woo Wai for allowing him to do so. I did not at any time intend to accept any money or enter into any fraudulent conspiracy with Woo Wai. Subsequent to April 2, 1910, we wished to get evidence personally against Woo Wai in order to arrest him, but didn't enter into any conspiracy to allow Woo Wai for money to bribe us. I did nothing to induce Woo Wai to bring Chinamen across the line. I saw the

(Testimony of Harry H. Weddle.)

letters which Mr. Conklin wrote to Woo Wai at the time they were written, or afterwards. Some of them were signed "R. L." I don't remember whether the ones I authorized were written in handwriting or typewriter. Mr. Conklin's house address was 860 Twenty-first Street, San Diego, Cal. The address on the envelope you handed me is that of Mr. Conklin's house. The postmark on the envelope is San Diego, January 3, 1911. I saw the letter after it was written. I did not authorize it. At that time I was under the Los Angeles office. Mr. Conklin was under me at that time. I did not authorize the sending of the letter, but acquiesced in it. I made no objection to it, and knew the purpose of it.

Mr. CAMPBELL.—I offer this letter in evidence, together with the envelope.

(Letter and envelope marked Defendants' Exhibit "D.") [135—49]

Mr. CAMPBELL.—(Reading:)

[Defendants' Exhibit "D"—Letter, Dated January 8, 1911—R. L. to Woo Wai.]

"Los Angeles, Cal., Jan. 8, 1911.

Woo Wai, San Francisco, Cal.

Dear Friend: Your letter saying eight men at San Bernardino received. Nobody watching Fresno. Nobody watching at Barstow, I was at Barstow before. Mr. Conklin tell me this morning that inspector at Bakersfield and inspector at San Bernardino must be in court at Los Angeles on Wednesday, January 11, 1911, at 9 o'clock, in the morning.

(Testimony of Harry H. Weddle.)

Maybe the case last two days. You must get your men out Wednesday night the 11th, or Thursday night the 12th, better you go out Wednesday night the 11th on the Santa Fe. You must send word your man at San Bernardino go out Wednesday night 11th January on Santa Fe. Maybe better you telegraph.

R. L."

The envelope is, "860 Twenty-first street, San Diego, Cal." The stamp is, "San Diego, Jan. 3, 11 P. M. 1911, California." Addressed, "Woo Wai, 684-85, Clay Street, San Francisco, Cal."

The WITNESS.—I have seen the letter dated Los Angeles, December 8, 1910; I saw this copy after the letter was written and forwarded. I never saw the envelope.

Mr. CAMPBELL.—We offer the letter and envelope.

(Marked Defendants' Exhibit "E.")

I think the purported telegram dated San Francisco, California, November 27, 1910, is in Mr. Conklin's handwriting, but I won't swear to it. Mr. Conklin was in San Francisco in the latter part of November, 1910. I remember receiving a wire from him telling me to go to his house to get a letter.

Mr. STEWART.—We will admit that Mr. Conklin wrote it to Mr. Weddle.

Mr. CAMPBELL.—(Reading:)

[Defendants' Exhibit "G"—Telegram Dated November 27, 1910—Conklin to Weddle.]

"San Francisco, Cal., Nov. 27, 1910.

To H. H. Weddle, Immigration Service, San Diego, Cal.

Send Chadney to Delzura immediately. Work toward east. Get letter [136—50] my house.

CONKLIN.

Official biz."

Mr. CAMPBELL.—(Reading:)

"San Bernardino, Calif., Dec. 25, 1910. Woo Wai, 766 Clay Street, San Francisco, Calif. Merry Christmas. R. L. 10:30 P. M."

(Said telegram is marked Defendants' Exhibit "G.")

Mr. STEWART.—No objection to this going in evidence.

Mr. CAMPBELL.—This is January 8th, 1911—is this admitted?

Mr. STEWART.—Yes.

Mr. CAMPBELL.—(Reading:)

[Defendants' Exhibit "H"—Telegram, Dated January 8, 1911, R. L. to Woo Wai.]

"Los Angeles, California, January 8, 1911.

Woo Wai, 766 Clay Street, San Francisco.

I sent you letter today and told you what to do. Everything be all right. I watch here three days.

R. L."

Mr. CAMPBELL.—That was the trouble. I got the two envelopes mixed. The other one was Janu-

(Testimony of Harry H. Weddle.)

ary 3d, and this is January 8th.

Mr. STEWART.—I would like to have that corrected.

(Last communication read is marked Defendants' Exhibit "H.")

Mr. CAMPBELL.—(Reading:)

[Defendants' Exhibit "I"—Letter, Dated January 2, 1911, R. L. to Woo Wai.]

"San Diego, Cal., Jan. 2, 1911.

Woo Wai, 685 Clay Street, San Francisco, Cal.

My dear friend Woo Wai: Whats the matter you? I arrange everything so that the inspectors watch other train while I watch Santa Fe. One man watch S. P. train Kern City, one man watch Salt Lake. I go San Bernardino and send you telegram you know everything all right. Then I go Barstow watch Santa Fe train. I fix everything at Los Angeles, no trouble then you not send boys. Whats the matter? Everything at Tia Juana all right and boys pass in the hills. Why did not you write me a letter. I passed Wong Wing. I tell him 'all right, you, go ahead.'

R. L."

(Said letter is marked Defendants' Exhibit "I.")

Q. Your first contract was to carry out your instructions from Professor Sanford, was it? [137—51] A. Yes, sir.

Q. By whom were you instructed, then, to get something on Woo Wai to arrest him?

A. By Benjamin J. Cable, the Assistant Secretary of Commerce and Labor, Daniel J. Keefe, the Commissioner General of Immigration, and Professor

(Testimony of Harry H. Weddle.)

J. W. Jenks, Commissioner of Immigration.

The instructions were given—Mr. Keefe, Commissioner General of Immigration, came to San Diego on the first of July, 1909, and we went over that matter with him at that time—I did. And the instructions—he told me then if anything came up about it to, if possible, have Woo Wai arrested. The subsequent instructions I received on May 1st, 1910, at Washington. I made a trip after Woo Wai came—on April 2d, 1910. Woo Wai and Wong Chung and Wong Yee came to San Diego—I made a trip to Washington on purpose to consult Professor Jenks, the Assistant Secretary of Commerce and Labor, and with Mr. Keefe, Commissioner General of Commerce, on that matter.

Q. Professor Jenks was the man who was investigating the Chinese immigration? He was a professor at Cornell, was he not? A. Yes, sir.

I reported fully what had occurred on April 2d, 1910, to those gentlemen.

Q. And what did they advise you to do?

A. Mr. Cable was very anxious to have us, if possible, get further evidence against Woo Wai in order that we might make a conviction. Mr. Keefe stated because of a letter that Professor Sanford had written Woo Wai, he didn't believe that anything else would come of this matter, and Professor Jenks thought the same; but they directed me to go to San Francisco upon my return [138—52] and consult with Mr. Wheeler, who was former Assistant Secretary of Commerce and Labor and was a member of

(Testimony of Harry H. Weddle.)

the Immigration Commission, and also Professor Sanford, and see what they thought could be done in the matter. Which I did. I saw those two gentlemen at Mr. Wheeler's house on the 8th of May, 1910.

Q. (By Mr. CAMPBELL.)—You had a conference with him?

A. Yes, sir. Mr. Wheeler and Professor Sanford told me at that time that they thought that the case ended, as Professor Sanford in April—the same April—had written to Woo Wai advising him that his previous visits to San Diego were known, and directing him that if he continued to try to smuggle Chinese into the United States it would result in his arrest and probable conviction.

Q. (By Mr. CAMPBELL.)—Then you don't know and cannot conceive in your own mind why, on the 13th day of March, 1910, Woo Wai should write a letter to Mr. Conklin in relation to Chinamen?

A. He gave as a reason, on his visit in April, the 2d, 1910, that he was unable to do any more business in San Francisco because a new man had been appointed there named Watts.

I reported that to Mr. Wheeler at the time of Woo Wai's visit in 1908.

Q. Mr. Wheeler was in touch with this entire proceeding?

A. Yes, sir. He told me to follow out Professor Sanford's program.

Q. Why did you have all these meetings at Inspector Conklin's house at the night-time?

A. Because I didn't wish to be seen.

(Testimony of Harry H. Weddle.)

Q. You didn't wish to be seen? A. No, sir.

Q. Why didn't you wish to be seen? [139—53]

A. Why—simply these Chinamen—nobody else in the office was familiar with this deal except Inspector Conklin. We were under strict instructions to keep all these matters secret and only report them to our superior officers.

Q. (By Mr. CAMPBELL.) You were acting under the instructions of your superior officers?

A. Yes, sir.

Q. You were working out a purpose, were you not?

A. Yes, sir.

Q. Now, did you deem it necessary to meet at Inspector Conklin's house in the night-time to confer with these Chinamen? A. Yes, sir.

Wong Yee didn't say in the conversation of November 16, 1908, nor in any conversation, I heard, "I no like this. I fraid."

Q. Didn't you say, the first time, "Oh, no danger. We all the same as the Government"?

A. No, sir.

We told him there was danger for us, and we didn't like the business.

Q. (By Mr. CAMPBELL.) You didn't like the business? A. No, sir.

Q. That was not true, was it? A. Yes, sir.

Q. Was it? Weren't you acting under instructions from your superior officers? A. Yes, sir.

Q. Well, did you dislike carrying out their instructions? A. I disliked such deals; yes, sir.

Q. What was there you disliked about it?

(Testimony of Harry H. Weddle.)

A. I disliked having any meetings, having to have meetings in the dark. [140—54]

Q. In the dark? A. Yes, sir.

Q. Now, isn't it a fact that you disliked the duplicity which you had to assume on behalf of the Government to fool this Chinaman?

A. Well, I certainly wished to arrest him when I found out what business he was in.

Q. You disliked, did you not, to tell the falsehoods and to make him believe you were standing in with him when you were not?

A. Yes, sir; I didn't like it.

Q. And that was the thing that you disliked about it, wasn't it? A. Yes, sir.

Q. In other words, you disliked, in the language of the street, "Putting up a job on the Chinamen"?

A. No, sir; we didn't put up a job on them.

I didn't know that Wong Yee had gone to Ensenada a second time until just before he was arrested, in June, 1911. I am positive that I saw Wong Chung in Mr. Conklin's office. I am positive that we got \$250—not \$260. Mr. Conklin didn't say to Woo Wai "You come down here on some expense and here is \$40." We didn't divide the money; we left it in a pile that was subsequently covered by a newspaper.

Q. This money was paid, as you understood it, for Chinamen that had already come into the country?

A. Yes, sir.

Q. And you intended to pounce down upon them in Redlands? A. Yes, sir.

Q. And you took \$300 of this man's money for

(Testimony of Harry H. Weddle.)

Chinamen that [141—55] you intended to pounce down upon, and then gave him back \$50, did you?

A. Yes, sir.

Q. And that was a month and a half before—the Chinamen had landed and gone away a month and a half before you got this money, hadn't they—about a month?

A. I think it was about a month. I don't remember, sir.

Q. Yes. And you knew at that time that Woo Wai had brought these Chinamen in, and you knew at that time that he had agreed to pay you \$50 a head for them, and you took the money? A. Yes, sir.

The WITNESS.—In December, 1910, Inspector Conklin took a shawl from Woo Wai for me. I didn't send it back to him, but kept it, and brought it here into Court, and all that time I was trying to get evidence against Woo Wai to convict him of a felony or a misdemeanor. Inspector Conklin, on his return from San Francisco, on one of his trips, told me that he and Woo Wai had a talk about a man named Jack, who had a gasoline launch, and that he (Conklin) wanted Jack to go over to Ensenada and bring over two men first. He also said that Woo Wai and Mar Jick wrote a letter. He didn't tell me that he had gotten Woo Wai and Jick to write this letter to be sent over to Ensenada by this man Jack. He said he was present when it was written, and that he took it to send it over to Ensenada by Jack.

Q. You knew Wong Yee was going over to Ensenada, didn't you? A. He stated he was; yes, sir.

(Testimony of Harry H. Weddle.)

Q. Well, didn't you give him the card to go and come back?

A. I gave it to him under the directions of the secretary.

Q. And you knew he was going over there to establish an agency for smuggling? [142—56]

A. He said he was, yes, sir. I didn't know what he was going to do.

Q. And still you asked this man to give you information, according to your testimony, as to what he could find out about smuggling?

A. Yes, sir, and would have been very glad to have gotten the information, and have used it in the service.

Q. And you would, at the same time, put the strong arm of the law upon him, when he got it for you? Is that it?

A. Why, I would have been glad to have taken the information if he turned it in; yes, sir.

Q. Now, I will ask you if it is not a fact that on Mr. Conklin's desk, in his room, between eight and nine o'clock at night, you didn't sit down and take a piece of paper and if you didn't mark out to the Chinamen where Orange was and say to them that Orange was a good place to go because there were two railroads—if you didn't tell them where Oxnard was—show them on the map, drawing where Oxnard was—if you didn't show them where San Bernardino was—if you didn't show them where Burbank was—and if you didn't draw out on a piece of paper all those places and mark that?

(Testimony of Harry H. Weddle.)

A. I don't remember.

Q. Will you swear you didn't?

A. No, sir, I will not swear I didn't.

Redirect Examination.

(By Mr. STEWART.)

The WITNESS.—The Mr. Watts that Woo Wai referred to when he said he could not do business in San Francisco because there was a man named Watts there now was a law clerk stationed in San Francisco about that time. He was sent direct from the Bureau, I believe, I never asked Woo Wai for any presents or any money, [143—57] nor did I know that any presents were going to be sent me before I got them. I never made personal use of any of them.

Recross-examination.

(By Mr. CAMPBELL.)

The WITNESS.—I didn't send them back.

Q. (By Mr. STEWART.) What did you keep them for?

A. Kept them for possible evidence.

HARRY H. WEDDLE recalled.

Direct Examination Resumed.

Q. (By Mr. STEWART.) Mr. Weddle, I now show you Defendants' Exhibit "F," and ask you to state what it is.

A. It is a copy of the original telegram I received from Inspector Conklin when he was in San Francisco November 27th.

Mr. STEWART.—(Reading:) "San Francisco, Cal., Nov. 27, 1910. To H. H. Weddle, Immigration

(Testimony of Harry H. Weddle.)

Service, San Diego, Cal. Send Chadney to Delzura immediately. Work toward east. Get letter my house. Conklin. Official biz."

Q. Will you explain what you did on receiving that telegram?

The WITNESS.—I called Inspector Chadney up at Nestor and told him to go to Delzura, in order to apprehend, if possible, the bunch of Chinamen that were coming across. The card I gave Wong Yee is the only writing or communication I ever gave to any of the defendants.

Cross-examination.

(By Mr. CAMPBELL.)

Q. Had you some understanding with Mr. Conklin that if he got any information from Woo Wai in San Francisco he would send you that kind of a telegram? A. Yes, sir.

Q. And he sent you the telegram in order that you might apprehend the Chinamen?

A. To attempt to do it; yes, sir. [144—58]

Q. Notwithstanding the fact that you had agreed to let them come in? A. Yes, sir.

Q. (By Mr. CAMPBELL.) Was it your ordinary way of doing business to agree to let Chinamen into the United States for \$50 a head, and then go to work and get information from him and arrest him? Was that the way you did your business in San Diego?

A. This is the only time. [145—59]

**[Testimony of Ralph L. Conklin, for the
Government.]**

RALPH L. CONKLIN, called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. STEWART.)

I am 32 years old, and have resided in San Diego almost continuously since '74. I am a Chinese Inspector in the Immigration Bureau. I have been in the service of the Government for eighteen years. I was a Chinese Inspector in April, 1910. I know all of the defendants.

I received United States Exhibit 5, a letter dated "San Francisco, March 21st, 1910," addressed to "Mr. Conklin, My dear Friend," and signed "Woo Wai," at my residence in San Diego, about April 1st or 2d, 1910. After receiving it, I carried it to Mr. Weddle, my Inspector in Charge, and remained at home the night of April 2d, Saturday night, expecting Woo Wai and Wong Yee. I received a telephone message from Woo Wai about 7:30 that they would soon be at the house, and soon after that Woo Wai, Wong Yee and Wong Chung arrived. I took them up to a private room which I used as an office, and they met Mr. Weddle. [146—60]

Woo Wai was the spokesman of the party. We shook hands all around, passed the usual greetings, and then Woo Wai said, "Now, we all right to go ahead do business," and stated there was a man by the name of Watts that had been appointed at San

(Testimony of Ralph L. Conklin.)

Francisco, and they could no longer do business there, so that he came down to see us. He said he was going to send Wong Yee to Ensenada to secure a Chinese merchant there to act as his forwarding agent, and he also stated that his (Woo Wai) private mark was H. S. W. W., and that all communications received by us marked that way we would know were all right and were from him. He said if we would remove the Inspectors from the line so that his men could pass, he would pay us \$50 for each man that passed through our district and reached his destination. He said his men were coming from Mexico. He didn't say where they were going. Mr. Weddle and I assented to it, and said we would remove the Inspectors, and allow the Chinese to come in. This matter was rather sudden and we wanted to lay the matter before our superior officers, and prayed for time more than anything else.

I received a communication from Woo Wai on the 5th of October, 1910, I think it was, stating he had some boys on the road.

I received United States Exhibit 12 for identification, a letter dated Aug. 22d, from Woo Wai before I received the letter of October 5th. I was stationed at Chula Vista at the time this letter came to my house, so I didn't get it for probably a week or ten days. I immediately forwarded it to Mr. Weddle.

I received United States Exhibit 13 for identification, letter dated September 8th, about September 10th. [147—61]

(Testimony of Ralph L. Conklin.)

United States Exhibit 14 was forwarded to me at Chula Vista from San Diego, and I received it about the 7th or 8th of October, 1910.

I met Woo Wai in my home in San Diego at the time mentioned in United States Exhibit 14. He, and a friend, afterwards introduced to me as Mar Jick, arrived at my house, and Woo Wai motioned for the friend to stay downstairs. I took Woo Wai up to my private room, where Mr. Weddle was waiting, and we had a conference. After shaking hands Woo Wai said he had been sick, otherwise he would have been down earlier. He said that the Chinese with their bodyguard had arrived from Mexico at Redlands after a hard journey of twenty-two days—twenty-two nights—through the mountains; that three of the Chinese gave out on the road and the Mexican had to hire a rig to haul them into Redlands and demanded extra pay for securing this rig, but that had been refused; that he paid his Mexican bodyguard \$120 per man for piloting the Chinese through the mountains, and allowed \$6 per head for feeding them on the way; that he paid the men at Redlands who had secreted and boarded them \$50 per head for that service; that he paid about \$13 apiece railroad fare for the Chinese from Redlands to Oakland, and that amount, plus the \$50 he had to pay us per head, and the cost of sending his men down to pilot the party from Redlands to Oakland would leave him only \$34 per head as his profit. He produced \$300. I told him that as long as he made only \$34 profit out of the transaction we would divide

(Testimony of Ralph L. Conklin.)

our profit with him, making \$42 per head for Woo Wai and \$42 for Mr. Weddle and myself as apparent profit of these six Chinese that came through in September by Redlands. We then [148—62] counted the money and I gave Woo Wai back ten \$5 gold pieces, and at Woo Wai's suggestion pulled a paper over the money as he went down to get Mar Jick. I understood from his gesture he didn't want Mar Jick to see the money. The money was left under the paper until Woo Wai and Mar Jick left. After they left, Mr. Weddle and I secured the dates on the nine twenties, four tens and six fives, placed the money in a purse, placed the purse in an envelope, and we then sealed it with red sealing-wax and stamped it with the letter "E," and I signed it and Mr. Weddle signed it across the sealed part. The envelope Mr. Weddle broke here during his testimony is the same envelope and package, and the seals remained unbroken from the night of October 8th, 1910, until they were opened here. I never used any of the money myself, and never intended to. We intended to use it as evidence for the conviction of these smugglers. In the conversation that night, Woo Wai said the six Chinese had been taken to his store in Oakland, 620 Harrison Street, and had been placed in the basement of the store until they had recovered from their foot-sore condition, and then they were sent out to various places. He said a man by the name of Hall was bringing Chinese in San Francisco by boat in opposition to him. Hall brought in over four hundred Chinese and landed them in the

(Testimony of Ralph L. Conklin.)

bay of San Francisco that year. He said, we must put Hall out of business or we can do no business. By "we" he evidently meant Weddle, myself and himself.

On the 22d of October, 1910, Mr. Berkshire, Supervising Inspector of the Mexican Frontier, Mr. Weddle, the Assistant U. S. Attorney and myself had a conference with the U. S. Attorney in Los Angeles, and it was decided to send me north to inquire into the conspiracy and find out [149—63] what they were doing and whether they were still bringing Chinese through. I arrived in San Francisco, November 26th, and that morning visited Mr. Benjamin McKinley, Assistant U. S. Attorney, at San Francisco, and laid the matter before him and asked for instructions. He told me to proceed on the line that was outlined by the Supervising Inspector of the Mexican Frontier. I also saw Mr. Keefe, the Commissioner General of Immigration, and Mr. Stewart, Mr. Keefe told me to proceed along the same lines, and to keep my appointment with Woo Wai for the next day. I saw Woo Wai first, November 27th, 1910, at his residence. As I came to the head of the stairs Woo Wai said: "How do you do? My God! Now you no get my letters?" Then he said he had written two letters to me—I think he said the 23d and 24th—telling me that seven or eight men were on the way from Ensenada and would cross the line there on their way north. He said they were coming by De Wanter, he called it; I think he meant Tia Juana. I had not then received the letters. That

(Testimony of Ralph L. Conklin.)

was the first intimation I had that there were seven or eight men coming in the month of November. I communicated with Mr. Weddle after receiving the information. Defendants' Exhibit "F" is a copy of the telegram I sent Weddle upon getting this information. The "Chadney" mentioned in the telegram is an inspector in the Immigration Service under Mr. Weddle. "Dulsura" is a place just north of the boundary line between the United States and Mexico. The country there is very broken, and Chinese often pass through that country. The latter part of the telegram refers to the letter Woo Wai mentioned to me as having been sent. On invitation of Woo Wai I met him at [150—64] Jack's restaurant, 615 Sacramento Street, the next day for early dinner. The witness, Pete Capdeville, here waited on us. Woo Wai told me of his different business propositions in San Francisco. He also spoke of A. W. Hall again coming in there. Told me how he came up through the bay with his Chinese down below deck in his nets piled on the deck; that he came about evening time. He also spoke of the importation of Chinese by boat as being much easier; that the Chinese boys didn't like these hard trips over land; that they would pay from three hundred dollars to three hundred and fifty apiece if brought in by boat, as it was quicker and much easier. He also spoke at that time of having them brought in by boat. I think he had a friend that had a China boat down south that would bring them in, and I told him that maybe we could find somebody to do that. I suggested a gen-

(Testimony of Ralph L. Conklin.)

tleman by the name of "Jock"—that name was purely fictitious; I never knew anyone by that name. The man that Woo Wai had expected to bring them in by boat had failed him, and I suggested the name of Jock—or Jack—merely for the purpose of obtaining a letter in his handwriting. I don't know the exact words that I used.

I received United States Exhibit "16" for identification from Woo Wai's hands at his house the evening of the 29th. He said, "Here is the letter I wrote you on the 24th. I forgot to mail it." And I took it from his hand. The letter was dated November 4th, and when he said that I added the pencil there. I opened the letter and read it immediately.

Mr. STEWART.—We offer this letter in evidence now. [151—65]

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 16—Letter, Dated November 24, 1910—H. S. W. W. to Conklin and Weddle.]

"San Fran., Nov. 24th, 1910.

Mr. Conklin—Mr. Wheddle.

My Dear friend. I have send you letter last night 7 or 8 mens Come 27–28–30 days in this month November pass De Wanter with the Mexico man walk on the Road go up San Bernardino stop buy ticket Come City I information you the 7 men may be 8 mens must very carefully get you men out let my mens pass with out any trouble if my mens come City I will Come down soon

Your Respectfully

H. S. W. W.

(Testimony of Ralph L. Conklin.)

My mens every one have H. S. mark."

(Marked United States Exhibit 16.)

Mr. CONKLIN.—I got the letter dated November 23d, later.

Mr. STEWART.—We offer this letter in evidence. It is United States Exhibit 15 for identification.

(Reading:)

[U. S. Exhibit No. 15 for Identification—Letter, Dated November 23, 1910, H. S. W. W. to Conklin and Weddle.]

"San Francisco, Nov. 23th, 1910

Mr. R. L. Conklin—Mr. Harry Wheddle

My dear friend I have 7 or 8 men Come Pass Dewanter walk on Road go San Bernandino from 27 28 or 30 this month they will comeing you must take care get youman out the road let my mens pass My men have H. S. Mark dont disappoint hop you wil carfully untill my men Come City I will Come see you soon.

Your respectfulty

H. S. W. W.

My men first pass Dewanter walk to San Bernandino very carefulty try get you man out sure."

Mr. CONKLIN.—It was arranged that I come to Woo Wai's house that evening to receive a letter to be delivered to Jock—Jack, and also to get some presents. I went to Woo Wai's house that evening. Mar Jick, Woo Wai and myself were present. Woo Wai and Mar Jick spoke in Chinese awhile, and then Woo Wai told Mar Jick to get some paper, and evidently dictated a letter, as [152—66] they

(Testimony of Ralph L. Conklin.)

talked back and forth and Mar Jick commenced to write something, and he wrote along on a letter and then they stopped awhile, and then Woo Wai took the brush or pen and he wrote a little. United States Exhibit 11 for identification is the sheet of paper on which they wrote. Mar Jick wrote on the left-hand side of the paper, and Woo Wai wrote on the right-hand side. That letter was placed in an envelope on which was stamped "Mar Luck." Mar Luck was a Chinese merchant. I asked Woo Wai how Jack, or Jock, would know where to find Mar Luck. I asked him if that was the sign on the store. Then they had some conversation in Chinese, and Woo Wai said "No"; then Woo Wai took the pen and write this "Yet Loi Company," and told me that was the sign of the mercantile establishment in Ensenada. The envelope was sealed when he handed it to me, Mar Jick immediately asked for the return of the letter, and I have received written communications from Woo Wai asking for its return.

(United States Exhibit 11 for identification introduced in evidence.)

During the conversation with Woo Wai on the 27th of November, 1910, Woo Wai said the same man who brought the six Chinese from Redlands would go down, or had gone down, to bring the rest; he didn't name him. I left San Francisco the evening of the 29th for Bakersfield, and from there went to Caliente. I was watching the different trains of the Santa Fe and Southern Pacific that ran north past Caliente, in the hope of intercepting this particular party of Chinese, and also for any contraband Chi-

(Testimony of Ralph L. Conklin.)

nese who might be traveling that way. By "particular party of Chinese" I mean this bunch of seven or eight that Woo Wai had brought through and was expecting from San Bernardino. From Caliente [153—67] I went to Point Richmond near San Francisco, for the purpose of intercepting contraband Chinese, and remained there until December 22d, or the morning of the 23d. I was still endeavoring to apprehend this bunch of eight. On the 23d of December I went over to San Francisco and called on Woo Wai, and went with him to dinner at Jack's restaurant, on his invitation. He told me that the man that he had sent down to San Bernardino had written him, requesting to be allowed to come home, and that he had told him to stay until the party came, or for a week longer at any rate. Woo Wai said that I should go to Los Angeles and if possible, secure a detail from my inspector in charge to watch the Santa Fe railroad; and that if I did secure a detail and did go to watch the railroad, that I should send him a telegram; that the telegram should be sent to "Woo Wai, 766 Clay Street, San Francisco, California," and just state "Merry Christmas," and be signed "R. L.," which would mean that I was watching the Santa Fe railroad. He said that if I was so detailed and Wong Wing Sai, whose description he gave, should pass, I should let him pass and say "All right—go ahead." Wong Wing Sai was Woo Wai's representative at San Bernardino, who was awaiting these Chinese.

I received United States Exhibit 17 for identification after my return to San Diego. The letter was

(Testimony of Ralph L. Conklin.)

delivered to Mr. Weddle, the inspector in charge, at San Diego.

Mr. STEWART.—We now offer this letter in evidence.

Mr. CAMPBELL.—No objection.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 17 for Identification—Letter, Dated December 2, 1910—H. S. W. W. to Conklin.]

“San Francisco Dec. 2th 1910

My dear friend Conklin

Mar Jack received letter to day Yet Loy & Co Mar Jick not in Ensenada Just now dont you give letter for Jock send letter back to me immetiately [154—68] I will try some other friend to do business for me I will send you another letter for Jack to go down Ensenada to see the other man

Your Respectfully

H. S. W. W.

685 Clay St S. F.

I will send you another letter for you to Jack as soon as possable.”

Mr. CONKLIN.—United States Exhibit 18 for identification was also delivered at my house, and delivered to Mr. Weddle. I was then at Caliente.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 18 for Identification—Letter, Dated December 15, 1910—H. S. W. W. to Conklin.]

“San Francisco Dec 15th 1910

My Dear Friend R. L. Conklin

I have Two men Ensenada every Thing all right

(Testimony of Ralph L. Conklin.)

doing business with me for ever any time I want 10 men or 15 men or 20 men he will furnish settle up for me untill he send & letter Come from Ensenada for me I will send down to you and you handel the letter for you friend Jack go Ensenada see this Two men do business without any trouble I wait letter Come send up to you immediately I have received you letter Come from Los Angeles last week now I did not hear any Thing about Them men I am very sorry I hop They Come City soon no trouble if any doys Come in City I will send you letter right way

Your Respectfulty

H. S. W. W.

685 Clay St.”

Q. (By Mr. STEWART.) He refers to a letter from you. Had you written him a letter?

A. Yes, sir.

(Referring to Defendants' Exhibit “E.”)

Mr. CONKLIN.—I think this is the first letter I ever wrote to Woo Wai. I don't remember of ever writing any letters prior to December 8, 1910.

After the meeting of December 23d with Woo Wai at San Francisco, I came from Los Angeles, and from there [155—69] went to Barstow, passing San Bernardino the night that I sent the “Merry Christmas” telegram. I remained at Barstow until Wong Wing Sai passed north bound, on Santa Fe No. 7, at 1:45 A. M. on the 30th of December. That morning I came to Los Angeles. After that I wrote the letter dated January 2d (Defendants' Exhibit “I”). By Wong Wing in that letter I meant

(Testimony of Ralph L. Conklin.)

Wong Wing Sai. I didn't see any Chinese contrabands with Wong Wing Sai on that train. I returned to my station at San Diego and afterwards received a communication from Woo Wai, which is marked United States Exhibit 19 for identification.

Mr. STEWART.—We offer this letter in evidence.
(Reading:)

**[U. S. Exhibit No. 19 for Identification—Letter,
Dated January 5, 1911—H. S. W. W. to
Conklin.]**

“San Francisco Jan. 5th 1911

My Dear friend Conklin

I have received letter to day 8 men have arrived at San Bernardino Storing there Because very important men watching the Parstow Station and Bakersfield Station and Fresno Station Those men Can you remove of Three Station on a Certain day at such time so I can Bring my men Pass through San Francisco safely if you can or not send me letter immediately another letter I received to day by you

Your Respectfully

H. S. W. W.”

Mr. CONKLIN.—That letter is the first information I had that the eight had arrived at San Bernardino. I received the letter about the time of the postmark—January 7th. After receiving the letter I sent Defendants' Exhibit “H” to Woo Wai; also a letter marked Defendants' Exhibit “D.”

I received United States Exhibit 20 for identification, dated January 6, 1911, from Woo Wai, but

(Testimony of Ralph L. Conklin.)

can't recall whether I received it at San Diego or after I got here. [156—70]

Mr. STEWART.—We offer that letter in evidence.
(Reading:)

[U. S. Exhibit No. 20 for Identification—Letter,
Dated January 6, 1911, H. S. W. W. to
Conklin.]

“San Francisco, Jan. 6th, 1911

Dear friend Conklin

I have send you one letter last night my men now arrived San Bernardino few days ago keep in one place waiting for me because Inspector watching at Barstow Station and Bakersfield Station Fresno Station I want you to remove Inspector of Three Station my 8 men Pass Through Come City safely give me cerant day such time 8 men pass Road no trouble I am waiting for you How I do it hoping you answer immediately one letter you send Come from you home I received friday after noon

I am Your truly

H. S. W. W.

I expect hear from you very important business.”

Mr. CAMPBELL.—No objection.

Mr. CONKLIN.—I went to Barstow from Los Angeles on that occasion to watch north bound trains on the Santa Fe and Southern Pacific; also the east-bound trains on the Santa Fe.

Mr. STEWART.—You admit the letter? (Referring to United States Exhibit 23 for identification, dated December 21, 1910.)

(Testimony of Ralph L. Conklin.)

Mr. CAMPBELL.—Yes.

Mr. STEWART.—And that it was received at San Diego?

Mr. CAMPBELL.—Yes.

Q. (By Mr. STEWART.) This letter is written December 21, 1910. This was before your last visit?

A. Yes, sir; during the time I was in Caliente.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 23 for Identification—Letter,
Dated December 21, 1910—H. S. W. W. to Mrs.
Conklin.]

“San Francisco Dec. 21th 1910

My dear friend Mrs. R. L. Conklin

please give this Chinese letter to Jack and take away to Ensenada see my friend he will furnish the men for me any time I have [157—71] one more letter I will send to you again the other Chinese letter Two Company do Business with me the other matter I have heard nothing of yet one man wait on San Bernandino Three weeks ago I am very sorry Expect every days I dont no what trouble the things not Come you get my letter must answer me immediately My address 685 Clay St.

Your Respectfully

H. S. W. W.”

Mr. STEWART.—We will offer the Chinese letter and the envelope in evidence.

Mr. CAMPBELL.—No objection.

Q. (By Mr. STEWART.)—You were in Los Angeles when you got this telegram, United States Exhibit 36, signed “H. S. W. W.” “Wednesday

(Testimony of Ralph L. Conklin.)

11th and Thursday 12th, at night, Santa Fe." What do you understand that telegram to be?

Mr. CAMPBELL.—Wait a minute. What he understood it to mean?

Mr. STEWART.—Yes. He had instructed Woo Wai to send him a telegram.

Mr. CAMPBELL.—Go ahead.

Mr. CONKLIN.—I understood it to be an answer to my letter.

Q. (By Mr. STEWART.) And what did you understand the meaning of it to be?

A. The Chinese boys would go out on that date.

Q. What date?

A. The date of the 11th and 12th, possibly.

Q. (By the COURT.) From San Bernardino, you mean? A. Yes, sir.

Mr. CONKLIN.—I received United States Exhibit 22 for identification, signed "H. S. W. W.," dated January 8, 1911, I think at San Diego, about the 8th or 9th of [158—72] January.

Mr. DENIS.—You have offered that in evidence, haven't you?

Mr. STEWART.—Yes, 22.

Mr. DENIS.—Government Exhibit 22?

Mr. STEWART.—Yes, sir. (Reading:)

**[U. S. Exhibit No. 22 for Identification—Letter,
Dated January 8, 1911, H. S. W. W. to Conklin.]**

“San Francisco Jan. 8th, 1911.

Dear friend Conklin

I have received you telegram this morning you

(Testimony of Ralph L. Conklin.)

say will wire me to morrow I must waiting you everything go by you Those men keeping at San Bernardino

Your truly

H. S. W. W."

Mr. CONKLIN.—I received the letter dated "San Francisco, January 9, 1911," signed "H. S. W. W." after my return to San Diego—about the 14th of January, 1911. That is the last letter I ever remember receiving from Woo Wai, and it was after I made the arrest.

Mr. STEWART.—(Reading:)

[U. S. Exhibit No. 21—Letter, Dated January 9, 1911, H. S. W. W. to Conklin.]

"San Francisco Jan. 9th 1911

Dear friend Conklin

Your letter I received came from L. A. to day Jan. 9th 3. oclock I send my man Wong Chong take train by 8 oclock to night go San Bernardino bring Men Come City at Wednesday night Jan. 11th maybe later Come on Thursday night 12th by Santa fe Road 8 men Come through one times you must look out for them no trouble I thank better way have you take train Come through watch Barstow Bakersfield Fresno Three Station let my men pass Can you do or not very much Oblige

I am Your Respectfulty

H. S. W. W."

Mr. STEWART.—We offer that in evidence as United States Exhibit 21.

Mr. CAMPBELL.—No objection.

(Testimony of Ralph L. Conklin.)

Mr. CONKLIN.—The night of the 11th, or rather the morning of the 12th, I saw Wong Chung and Wong Dom Him at Barstow. They were just leaving train No. 10 and [159—73] crossing over to train No. 7 of the Santa Fe. I saw them get off the train. Wong Chung got off first. He was three or four feet ahead of the others. He walked right down alongside of No. 7, approached the front end of a day coach, climbed up into the day coach, went in the front end and started down the aisle of the rear day coach followed by the three or four Chinamen. Wong Chung, as he got just inside the coach—probably two or three steps—turned like this and then proceeded down the aisle of the coach toward the rear. I was standing outside alongside of No. 10, where I could look into the cars of No. 7. It was a lighted train and I could see right in. The three sat down, and Wong Chung continued on through that car and went into the tourist sleeper. I got on the same train and traveled to Mojave, where I was joined by Inspector Morse. When he got aboard we went into the tourist car and took Wong Chung out of the berth and took him into the day coach and then placed these three fellows under arrest—Wong Dom Him, Wong Kum and Wong Sum, and continued on until we reached Tehachapi. At Tehachapi we took Wong Dom Him, Wong Kum and Wong Sum and Wong Chung off the train and kept them in the depot until daylight.

Q. (By Mr. STEWART.) Examine those documents and state which of them you took from the

(Testimony of Ralph L. Conklin.)

Chinese on the morning of January 12th. I show you, also, another ticket.

A. I took these three from the first party, Wong Chung, Wong Sum, Wong Kum and Wong Dom Him. There is one short.

The COURT.—That is the ticket 303, is it?

Mr. STEWART.—301 is not here. That was testified to by one of the ticket agents. [160—74]

Q. Do you remember the number of it—what it was? We have here 300, 302 and 307.

A. 301 ought to be here.

Q. From whom did you take No. 307?

A. Wong Dom Him.

Mr. CONKLIN.—I saw Wong Wing Sai the following morning at Mojave. We found two Chinamen in the same car, by the name of Wong Ging Wee and Wong Ging Foon—the two witnesses who testified here. We took them to Tehachapi also. We searched Wong Chung and all the others. I found certain drafts on Wong Wing Sai, namely, one in duplicate form No. 14491, for \$1000, dated Los Angeles, California, U. S. A., October 18, 1907, payable to Quong Hop, issued by Farmers and Merchants' National Bank of Los Angeles to the Russo-Chinese Bank, Hong Kong, and endorsed by Wong Chung; and one for No. 14492, of the same bank, payable to the same party, and for \$1000, and the same date found in the possession of Wong Wing Sai and endorsed by Wong Chung; first and second of both these drafts being found. Also draft No. 13389, payable to Wong Chung, dated December 21, 1908, for

(Testimony of Ralph L. Conklin.)

\$350, issued by the Canton Bank, to the International Banking Corporation of Hong Kong, and the second one is issued by the same bank, dated apparently June 2d, 1909, payable to Wong Chung for \$40, and another issued by the same bank dated January 8, 1909, payable to Wong Chung for \$160. I took a memorandum-book from Wong Wing Sai.

(It was admitted by counsel for defense that the address 620 Harrison Street, Oakland, California, is endorsed inside of the cover of the book, and it is a store of which Woo Wai is the principal partner, and Wong Chung is the manager.) [161—75]

Mr. CONKLIN.—I found ticket No. 300 in the possession of Wong Chung. (Tickets Nos. 300 and 301, introduced in evidence as United States Exhibits 39 and 40 without objection.)

Q. (By Mr. STEWART.) Now, did you find anything else upon either of the defendants, except what you have testified about?

A. Yes, sir. I found about \$330 on Wong Chung, \$585 on Wong Wing Sai, a diamond ring, watch, and a 40-Colt's pistol.

Cross-examination.

(By Mr. CAMPBELL.)

Mr. CONKLIN.—I think the letter of March 31st, 1910, signed "H. S. W. W.," was the first letter received from "W. W." I knew him prior to that time. I saw him on November 16, 1908. I had seen Woo Wai before that time, in October of the same year. I don't know who Mr. Roy is except his name

(Testimony of Ralph L. Conklin.)

was Roy. I saw Woo Wai and Roy first at the Hotel Lanier.

I received United States Exhibit 5 about the 1st or 2d day of April, 1910. The letter says "G. M. Roy not in the city."

I received the letter of March 31st, 1910, and kept my appointment as requested. I had an idea what Woo Wai was coming to see me about, from a proposition that he had made to me a year and a half before. I had had no correspondence with him for a year and a half, nor had we received any proposition from him within that time. I didn't write Woo Wai a letter to which the letter of March 31st, 1910, is an answer. I don't know why he stated in the letter that Mr. Roy was not in the city. I met Roy as I stated, in 1908; I didn't know him. I had word from Professor Sanford that a party was going to meet me to make a business proposition. Roy came to my house and took me to the Hotel Lanier, where I met Woo Wai. Roy told me he was the party that was sent down to meet me. He didn't state by whom he was sent, but I thought he meant Professor Sanford. I didn't know that Roy was [162—76] bringing Woo Wai down to make a proposition to Mr. Weddle and myself to let Chinamen cross the border from Mexico, but thought possibly that was the case because I was in the Immigration Service. From the Hotel Lanier we went to the Immigration Office, where Mr. Roy greeted Weddle and introduced Woo Wai to him, saying: "This is my friend." When I went to the hotel I had never seen Woo Wai,

(Testimony of Ralph L. Conklin.)

and didn't know who he was.

Q. And what did Mr. Roy say after that?

A. He said that Woo Wai had a proposition to make to us.

Q. To make to whom?

A. Well, he said, "To you."

Q. And what was the proposition?

A. Woo Wai said that if we would remove the inspectors from the line so that his China boys from Mexico could pass, he would give us \$50 apiece for each Chinaman that reached their destination. We assented to that. We didn't intend to do it, however, unless instructed to. Professor Sanford told us he was making some investigation in San Francisco, and desired certain information, and thought the party could furnish it. He didn't state who it was. He wanted this party to come to us and submit a proposition to us and for us to assent to it. We agreed to that, provided we didn't have to do anything unlawful, or that we didn't have to be drawn into any controversy. He wanted to get this man, as it were, "in the door" so that man would have to give him the information.

Q. You didn't intend to let the Chinamen pass?

A. No, sir; not unless we were instructed to.

Q. And you told the Chinaman a falsehood right there? A. Yes, sir; we did.

Q. Both you and Weddle? [163—77].

A. We allowed Woo Wai to think we would agree to his proposition; I saw Woo Wai after that on November 16, 1908, at my house. Wong Chung and

(Testimony of Ralph L. Conklin.)

Wong Yee were with him. Woo Wai introduced Mr. Weddle and myself to Wong Chung and Wong Yee and renewed the proposition that he had made October 26, 1908. Wong Yee never mentioned any danger. Mr. Weddle and myself told Woo Wai it was dangerous for us.

Q. What was the danger for you? Acting under instructions from your superior, now, tell the jury what was the danger for you?

A. I don't suppose Woo Wai knew we were acting under instructions.

Q. I am not talking about that. But you told him that there was danger for you, when in fact there was none. Is not that so?

A. No, sir. There was danger for us in many ways.

Q. How?

A. If we happened to intercept the wrong bunch of Mexicans with those Chinamen we would probably get shot. That is one danger. Another danger would be if we were caught in this it would probably be rather dangerous for our reputations.

Q. "Caught" in what?

A. Caught in this apparent conspiracy.

Q. But, my dear man, weren't you acting under the instructions of your superior? A. We were.

Q. And is not that what you meant to convey to Woo Wai when you said it was dangerous?

A. No, sir; I never intended to convey to him that we were not acting under our instructions.

Q. Did you say anything to him about standing up

(Testimony of Ralph L. Conklin.)

the wrong bunch of Mexicans? [164—78]

A. No, sir.

Q. What do you mean by “the wrong bunch of Mexicans”?

The COURT.—I don’t care to have that gone into any further.

Mr. CAMPBELL.—I take an exception, if your Honor please. I think I am entitled to carry out the witness’ statement.

The COURT.—Proceed.

Q. (By Mr. CAMPBELL.) Now, as a matter of fact, there was not any danger to you at all if you carried out the instructions of your superiors, was there?

A. Not as long as we didn’t admit any; no.

Q. (By Mr. CAMPBELL.) Well, you told him that which was not true, then, didn’t you?

A. Possibly.

Q. Now, then, didn’t you and Mr. Weddle get together, and didn’t you and Mr. Weddle say to each other, “This is not a nice piece of business”—in other words, “This is a dirty, lowdown trick, and we don’t intend to carry it out”? A. No, sir.

Q. You didn’t do that? A. No, sir.

Q. Did you hear Mr. Weddle’s testimony the other day? A. Yes, sir.

Q. You and Mr. Weddle, neither of you, so far as you know, had any compunctions of conscience about carrying this matter out?

A. Yes, sir; we both disliked very much to.

Q. Why did you dislike it?

(Testimony of Ralph L. Conklin.)

A. Because I hate to connive or associate with that kind of stock.

Q. What?

A. I hate to connive or associate with that kind of people. [165—79]

Q. What kind of people? A. Crooks.

Q. "Crooks"? A. Yes.

Q. But you did it, didn't you?

A. Yes, under orders.

Q. Under orders from your superiors?

A. Yes, sir.

Woo Wai stated in that conversation that he was going to send Wong Yee to Ensenada for the purpose of securing some Chinese merchant at Ensenada to act as his receiving and forwarding agent for contraband Chinese consigned to the United States.

On his return Wong Yee said that he had gone to Ensenada overland and while in Ensenada had secured an agent to handle their business there and act as forwarding agent, and that a party would soon be on the road, but that it was very cold, and a very hard trip, and just at present the Chinese boys didn't like to make the trip. Wong Yee didn't tell me on his return from Ensenada that there were no Chinamen there that wanted to come over, nor that they thought he was an agent of the Government of the United States, and would not talk to him. I asked him if he had learned anything about any parties running Chinese across the border.

Q. Didn't you ask him about any Mexican by name?

(Testimony of Ralph L. Conklin.)

A. Why, I am pretty well acquainted with most of the Mexicans that are in that business. I possibly might have asked him.

Q. You knew that he was given a pass to go and come back?

A. Yes, sir; I knew that we had received instructions from Washington to let him go.

Q. Did you write that letter? [166—80]

A. Yes, sir.

Q. That is marked Defendants' Exhibit I. Kindly read it.

A. (Reading:) "What's the matter you? I arrange everything so that the inspectors watch other trains while I watch Santa Fe. One man watch S. P. train Kern City. One man watch Salt Lake. I go San Bernardino I send you telegram. You know everything all right. When I go Barstow watch Santa Fe train. I fix everything at Los Angeles no trouble then you not send boys. What's the matter? Everything at Tia Juana all right and boys pass in hills. Why do not you write me letter? I pass Wong Wing." I told him "All right you, go ahead. R. L."

Q. Who was Wong Wing that you referred to?

A. Wong Wing was the man he told me he had sent to Ensenada for the purpose of bringing the boys—

Q. When did you pass him and tell him everything was all right?

A. I passed him on No. 7. He came in on No. 10 from San Bernardino and transferred to No. 7 at

(Testimony of Ralph L. Conklin.)

Barstow at 1:45 on December 30th and I said to him
"All right, you go ahead."

Q. What did you mean by that?

A. I meant to show him that I knew who he was.

Q. Is that all? "Go ahead" and do what?

A. Go ahead to Frisco. That was my arrangement with Woo Wai, that his men should pass.

Q. But what was he going to San Francisco for?

A. I don't know.

Q. Now, then, how did you know this: "Everything at Tia Juana all right and the boys pass in the hills." A. If you refer to a letter—

Q. I want to know— [167—81]

A. I received a letter from Woo Wai in which he said that the boys passed.

Q. Why did you repeat it in this letter—"Everything is all right and the boys pass in the hills"?

A. He told me they had. I didn't know that they had. It usually takes about twenty days to make that trip.

Q. How did you know that?

A. Because we kept track on different Chinamen that came through there, or tried to.

On November 23d is the first time that I received notice that they were coming.

Q. (By Mr. CAMPBELL.) What does he say there?

A. (Reading:) "I have seven or eight men come pass DeWanter"—it is either Tecate or Tia Juana—I think it is Tia Juana. "Walk on road go San Bernardino from 27, 28 or 30 this month. You must

(Testimony of Ralph L. Conklin.)

take care get you men out the road let my mans pass my men have H. S. mark dont disappoint hope you will carefully until my men come city I will come see you soon Your respectfully H S W W My men first pass DeWanter walk to San Bernardino very carefully try get you men out sure.”

Q. Is that the letter which caused you to repeat that information to him, that everything was all right, the boys had passed in the hills?

A. That is one of the things.

Q. What else were the other things?

A. Because he told me.

Q. When? A. December 23d as I have stated.

Q. How did he tell you that the boys had passed in the hills on December 23d, 1910? [168—82]

A. He told me at that conversation at Jack's restaurant. I didn't see Woo Wai from the 16th of November, 1908, to March, 1910.

Q. Had you corresponded with him?

A. No, sir, except I received about Christmas time in 1908 a package from him.

Q. Have you corresponded with Mr. Roy?

A. No, sir, never did.

Q. Have you seen Mr. Roy? A. I saw him—

Q. Between those two dates, please.

A. I saw him about the latter part of November, 1908. I received instructions to meet him here at the Alexandria Hotel. He had been sent there, so he said, by Professor Sanford to see why Weddle would not allow Wong Yee to go to Ensenada.

The letter of March 31st from Woo Wai came to

(Testimony of Ralph L. Conklin.)

be absolutely without any instigation of any kind or character whatsoever. I didn't ask Woo Wai during the conversation at Jack's restaurant to destroy letters received from me; neither did he give me a letter in Jack's restaurant which I had written to him; and I didn't write him any letters from December, 1908, to March, 1910. I never wrote any letters to Roy, nor had any conferences with him except the one at the Alexandria. I never saw him after that time. That conference lasted about three minutes. He asked me why Weddle refused to allow Wong Yee to go to Ensenada. I told him because the papers were not correct. At that time he represented Professor Sanford. Professor Sanford had told me he was conducting some investigations on the coast, and represented Professor Jenks of the Immigration Committee. In the conversation at my house April 2d, 1910, at which Woo Wai, Wong [169—83], Chung and Wong Yee, and Mr. Weddle were present, Woo Wai said no more business could be done in San Francisco because a new man named Watts had been appointed, and he said he would give us \$50 a head, as he agreed, before, if we would remove the Inspectors so that his Chinese boys from Mexico could pass through our district in safety to their destination. He said he was going to send Wong Yee to Ensenada, but that he would send him by steamer from San Francisco. He also said that his (Woo Wai) private mark was "H. S. W. W." and any communications we received from him signed that way would be all right. The offer was about the same he had

(Testimony of Ralph L. Conklin.)

made in the Immigration office on October 26th, 1908, before Weddle and myself. I think Woo Wai said that each one of his boys would be given an "H. S." card. I never heard anything about putting a handkerchief around the neck of the Chinamen, or the Mexican that had them in charge, nor was anything said about the particular place to which the Chinamen should go when they came across the border.

Q. Did you not sit down at your desk in your private office—what you call your private office in your room—and mark out in the presence of Wong Yee, Wong Chung and Woo Wai, the towns on the southern coast of California—Oxnard, Orange, San Bernardino and Redlands, on a map?

A. Not at that meeting.

Q. At what meeting did you do that?

A. If I did that at all—I don't say that I did—but if I did it at all I did it in—not Oxnard, because I didn't know of Oxnard, I never had been there.

Q. What towns did you mark?

A. I don't know what towns I marked, but if it was any it was Santa Ana and Orange, and others that I am familiar with, [170—84] because I am familiar with them. I was over them horseback many times.

Q. You say if you did it you marked Orange and the other places. Why do you say that?

A. Because in our conversation of November 16, 1908, it was discussed whether Burbank or Orange would be the better place, and Woo Wai suggested

(Testimony of Ralph L. Conklin.)

Orange was better because it was nearer, and Wong Yee and Wong Chung said that Burbank was better.

Q. What did you state?

A. I said Orange was better.

Q. Why did you say that?

A. Because I thought the points Woo Wai made were well taken.

Q. That is, there were two railroad stations there?

A. Yes, sir. There is two railroads. There is a branch road. But it is a little easier to apprehend a party there than some place that you don't know. I didn't say to Wong Chung in 1910 that he had better go to Orange to-morrow and see the Chinaman that kept a store and laundry, but to look out when he got to the place because he had a bad dog; nor did I say anything about Redlands in 1910. I didn't know that these Chinamen were going to be landed at Redlands until I received a message from Woo Wai.

Q. (By Mr. CAMPBELL.) Now, Mr. Conklin, why did you acquiesce in this demand made by Woo Wai in 1910?

A. As he stated yesterday when these people came on April 2d, 1910, we didn't know what to do. This proposition that had been made to us a year and a half before we supposed was dead and gone, and that that was the end of it, and we never thought there would be anything come of it. Mr. Weddle had talked the matter [171—85] over with the Commissioner General the year before, and he said "Don't bother; it is gone," and we never thought

(Testimony of Ralph L. Conklin.)

anything would come out of it, and this came suddenly and we played for time till Mr. Weddle could receive competent instructions.

Q. What competent instructions did you get after the 2d of April, 1910?

A. He said that Woo Wai had been notified that his operations were known, and that that was the end of it.

Q. What instructions did he give you after he came from San Francisco, having been at Washington, in 1910?

A. To do nothing; to let the matter rest.

At that time we were under the Mexican frontier district with headquarters at El Paso, under Mr. Berkshire. The matter was taken up by Weddle and myself with him and the assistant United States attorney here.

Q. What instructions were you given in relation to it?

A. I was then advised or instructed to go to San Francisco—and learn all I could concerning the conspiracy. These six men, in the meantime, had been already landed and we failed to apprehend them.

Q. (By Mr. CAMPBELL.) And you went to San Francisco? A. I did.

Q. And you went to Woo Wai's house?

A. I did.

Q. How many times did you go to Woo Wai's house?

A. I was there on the morning of the 27th, and I was at Jack's restaurant on the 28th with Woo Wai.

(Testimony of Ralph L. Conklin.)

I was out at Woo Wai's house on the 29th.

Q. Do you know Woo Wai's family?

A. I have seen a boy. I think that is the boy right there. [172—86]

Q. And the little girl? A. Yes, sir.

Q. And the wife?

A. I don't remember about the wife.

Q. Isn't that lady sitting there a lady that you saw as Woo Wai's wife at his house?

A. I am not sure that I saw—I saw a lady there, but I am not sure that I met her. But the two children were introduced to me.

Q. Kindly tell the jury what you were doing in Woo Wai's house.

A. I was there at his invitation.

Q. How did he know you were in town?

A. I telephoned to him.

Q. What did you telephone to him?

A. I asked him if he was there and told him who I was, and asked him if he would be there a little while.

Q. And you came up there? A. Yes.

Q. You were trying to find out then something from Woo Wai? A. I was.

Q. What was it?

A. I was trying to find out all I could in regard to this conspiracy, and the disposition of the six men that we failed to apprehend, and all I could in regard to the conspiracy.

Q. Did you take that little girl on your knee in his house?

(Testimony of Ralph L. Conklin.)

Mr. STEWART.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—If he took a dozen children on his knee it wouldn't have anything to do with this case.

[173—87]

Mr. CAMPBELL.—Of course, your Honor has ruled, without giving me an opportunity to be heard. I think it is a very material matter.

The COURT.—I rule it out.

Mr. CAMPBELL.—And I take exception. And, for the purpose of making my record, which your Honor knows that I think I am right, I will ask you if you didn't take that little child on your knee and if you did not instruct Woo Wai to tell it in Chinese to kiss you, and if you didn't kiss it.

A. No, no. When I went into the house he said, "How do you do. My God! Why you not get my letters?" And he explained that he wrote two letters stating that there were seven or eight men going to come across the line, and he wanted me to look out for them.

Q. And then you sent this telegram to Mr Weddle to go to your house and get the letters?

A. I did.

Q. When was it that you talked about this boat and the man Jock?

A. On the 28th at Jack's restaurant. I told him there was a man named Jock that had a boat.

Q. Just told him a man named Jock had a boat?

A. That a man named Jock had a boat and he might interest him to go into this business.

(Testimony of Ralph L. Conklin.)

Q. Didn't you tell him you were going to see him?

A. Yes.

Q. You did not intend to do it? A. No, sir.

Q. What did you tell him that for?

A. I wanted a letter directed to people in Ensenada with [174—88] whom he was doing business. I didn't know how I could get a letter directed to those people unless I got it in that way, and I got it expecting that thereby I would know who the party was in Ensenada through whom they were operating.

Q. That is the reason you told him all about this boat and about Jock and things of that kind,—to get from him a letter to some person in Ensenada?

A. Yes, sir.

Q. And every word that you told him was absolutely and unqualifiedly false, was it not?

A. Yes, sir.

Q. What did you do that for?

A. I wanted to get evidence. I knew if I told him that I wanted to get evidence, I wouldn't get it.

Q. Were you willing to tell a falsehood to get evidence, even against a Chinaman? A. I did.

Q. Will you kindly answer?

A. No, sir, I was not willing, but I did.

Q. And that same spirit pursued you through these entire proceedings?

A. After I found that he was bringing Chinamen and that we couldn't stop him, I told our supervising inspector about it and I was instructed to secure evidence.

(Testimony of Ralph L. Conklin.)

Q. And you were willing to do anything to procure what you deemed to be evidence?

A. No, sir; I didn't say that.

Q. What were you willing to do to procure it?

A. I was willing to do most anything I could in order to gain the evidence necessary, without committing any crime. [175—89]

Q. Where did you get the envelope and the seal and the mark "E" and the sealing wax in which you put the two hundred and fifty dollars or the purse containing the two hundred and fifty dollars?

A. Out of my desk right there in my office.

Q. He was giving you fifty dollars a man that you failed to arrest because they got away from *you* — — — *Redlands*?

A. Yes, sir.

Q. Did you say anything to him about it, that you expected to arrest them, or tried to arrest them at *Redlands*?

A. No, sir.

Q. Did you give Woo Wai any presents?

A. Yes, sir.

Q. What did you give him?

A. I think I gave him an amber cigar-holder, and bought some presents for his children.

Q. Bought presents for his children?

A. Yes, sir.

Q. When?

A. When I was up there in November.

Q. Why?

A. Well, he had made a present to me or for my wife, and I was on the street and saw these jumping-jacks, and bought two or three for his children.

(Testimony of Ralph L. Conklin.)

Q. When did you give him the cigar-holder?

A. I bought one for him and one for me, and I think I gave it to him at one of those dinners at Jack's. I have forgotten which one. Probably the last one.

Q. And the man whom you were endeavoring to get evidence against to convict of a crime against the Government of the United [176—90] States, you bought presents for him and for his children?

A. Yes, sir; the same man that was trying to bribe me.

Q. Were you trying to bribe him?

A. No, sir.

Mr. CONKLIN.—When Mar Jick asked me for the return of the letter in Woo Wai's house, I said: "That is all right; that is all right," and put it in my pocket.

Redirect Examination.

(By Mr. STEWART.)

Mr. STEWART.—Referring to the Chinese letter that was contained in United States Exhibit 23 which was not translated yesterday, but which we said would be translated and introduced before our case closed, we have a translation which I understand counsel agree is correct and admit that it may be read into the record. That is correct, isn't it?

Mr. CAMPBELL.—I understand so. Mr. Denis said it is substantially correct.

The COURT.—What letter was it enclosed in?

Mr. STEWART.—In the letter of December 21, 1910.

(Testimony of Ralph L. Conklin.)

Mr. DENIS.—To Mr. Conklin?

(Translation of letter:)

Mr. STEWART.—(Reading:)

**[Translation of Letter Contained in U. S. Exhibit
No. 23.]**

“On presentation of this writing please deliver goods, merchandise four or five packages, to be brought hither according to instructions.” Dated 11th moon 16th day (Dec. 16, 1910). Signed Brother Chun Yue. Writings on envelope, “Soon Lee Ping Co. Prosperous and safe (journey).”

Mr. STEWART.—There are two other exhibits which are similarly marked and identified which we desire to offer. The original telegram of Woo Wai dated January 10, 1911.

Mr. CAMPBELL.—That is admitted.

Mr. STEWART.—And also United States Exhibit 9 for Identification, [177—91] a number of tickets—seven railroad tickets from Redlands to San Francisco, September 7, 1910.

Mr. CAMPBELL.—We admit them for what they are worth.

The COURT.—I believe if they have been used they are not worth much.

Mr. CAMPBELL.—They are not worth much in any sense, either for the ride or for the penitentiary ride.

Mr. STEWART.—United States Exhibit 24 for identification is as follows: (Reading:)

**[U. S. Exhibit No. 24 for Identification—Telegram
Dated January 10, 1911—H. S. W. W. to R. L.]**

“San Fran Jan. 10 1911

To R. L. 847 Wensington Road Los Angeles, Cal.

Wednesday Eleventh and Thursday Twelfth at
night Santa Fe

H. S. W. W.”

Mr. STEWART.—We offer United States Exhibit 9—seven stubs of tickets identified by Mr. Morgan, the ticket agent at Redlands, on September 7th, which he said were bought by Wong Wing Sai. That comes in in connection with the letter of Woo Wai of August 22—that six men came by Redlands.

[Testimony of Tom King Chong, for Defendants.]

TOM KING CHONG, called as a witness on behalf of the defendants, testified that for the past fifteen years he has been the editor of a Chinese Republican newspaper, and at the present time was engaged in delivering lectures to Masonic fraternities concerning the Chinese Republic, and its connection with Masonry. Mr. Chong had known the defendant Woo Wai in San Francisco for more than twenty years. During that time the witness had known him intimately, and had also known the people with whom he associated. Woo Wai's reputation in San Francisco for truth, honesty and integrity was good.

In the year 1908 the witness knew a man named Golden M. Roy. One day he met Roy on Kearny Street in San Francisco. Witness [178—92] then related the following conversation:

“A. One day I met Mr. Roy on Kearny Street.

(Testimony of Tom King Chong.)

He asked me if I knew Woo Wai. I told him I do. So he asked me if I could get Woo Wai to come and see him, to meet him. I say yes. I said 'What is it about?' He said, 'About a money-making proposition, I would like to see him.' Then he suggests that the next day, two o'clock in the afternoon, at Mr. L. G. Carpenter's office."

The witness then communicated with Woo Wai and made the appointment for Roy in accordance with the latter's request.

[Testimony of John Birmingham, Jr., for Defendants.]

JOHN BIRMINGHAM, Jr., called on behalf of the defendant, Wong Yee, testified that he had been the Superintendent of the Dupont Powder Works, which was located just above the works of the Giant Powder Company. At this time the defendant Wong Yee furnished Chinese laborers for the latter. His reputation for truth, honesty and integrity was good.

[Testimony of John J. Quinn, for Defendants.]

JOHN J. QUINN, called on behalf of the defendant Woo Wai, testified that he had known the defendant, Woo Wai, fully 25 years. During most of that time he had been associated with the attorney for the Chinese Consul, and in this connection had met Woo Wai. Since 1906 the witness had been engaged in the real estate business. The witness testified that he knew the general reputation of Woo Wai in the community in which he lived for truth, honesty and integrity, and it was good. His repu-

(Testimony of John J. Quinn.)

tation for morality and as a law-abiding citizen was also good. The witness had been at Woo Wai's home many times. "Woo Wai has a little family there," and said the witness, "with little children there. From my observation I should say he is a moral man." [179—93]

[Testimony of B. M. Thomas, for Defendants.]

B. M. THOMAS, called on behalf of the defendant, Woo Wai, testified that he was an Internal Revenue Agent in charge of the Pacific Coast, having been in the Government service for 32 years. He had known defendant Woo Wai about 24 years, and the reputation in the community in which he lived for truth, honesty and integrity was good.

[Testimony of Frederick B. Hoyt, for Defendants.]

FREDERICK B. HOYT, called on behalf of Woo Wai, Wong Yee and Wong Chung, testified that he had known the defendants Woo Wai and Wong Yee for more than 20 years. Their reputation in the community in which they lived for truth, honesty and integrity is good. The witness had known Wong Chung for ten years. His reputation in the community in which he lives for truth, honesty and integrity is good.

[Testimony of C. S. Peck, for Defendants.]

C. S. PECK, a witness called on behalf of the defendants Woo Wai, Wong Yee and Wong Chung, testified that he had known Woo Wai for more than five years, and Wong Yee and Wong Chung for more than 15 years. Their reputation in the community

(Testimony of B. M. Thomas.)

in which they live, for truth, honesty and integrity, is excellent.

[Testimony of I. H. Sanborn, for Defendants.]

I. H. SANBORN, a witness called on behalf of the defendant Woo Wai, testified that he was Assistant Cashier of the American National Bank of San Francisco. He had known the defendant Woo Wai for more than six years. His reputation in San Francisco for truth, honesty and integrity is very good.

[Testimony of N. A. Gosliner, for Defendants.]

N. A. GOSLINER, called as a witness on behalf of the defendant Wong Yee, testified that he was a retired property owner in San Francisco and had known defendant Wong Yee about eleven years [180—94] having business with him during that time. Wong Yee's reputation in San Francisco for truth, honesty and integrity is very good. [181—95]

[Testimony of Woo Wai, for Defendants.]

WOO WAI, called as a witness in his own behalf and that of the other defendants, testified as follows:

My name is Woo Wai. I have always lived in San Francisco since I have been in California. I have been engaged in business—general merchandise.

Q. Do you know a man by the name of Golden M. Roy? A. Yes, sir, I know him.

Q. Where had you known him before the year 1908?

A. Well, before, Roy—he got a jewelry store on

(Testimony of Woo Wai.)

Kearny Street, between Sacramento and California; every Chinese go to buy jewelry of him. I buy a good deal of jewelry from him, too.

Q. That is, you had bought jewelry from him before the fire?

A. Yes, sir. I met Mr. Roy in 1908, in San Francisco at the office of Mr. Carpenter, a lawyer. Kong Kan Ching telephoned to my house that Roy wanted to meet me at Carpenter's office. Next day at two o'clock I go up there. Roy was there. Well, he say, "Why, you come up to my house to-night at eight o'clock." I say, "All right." "Well, what is the reason?" He say, "Sometimes make money; you come up to my house, I tell you to-night." I say, "All right, eight o'clock." And I took Sacramento Street car.

I go up to his house, and he say "Woo, I got a very good friend at San Diego." He took out of his pocket a book; showed me the book, a little pocket-book, and showed me two gentlemen's names, one was H. H. Weddle (spelling W-e-d-d-l-e), the other was R. L. Conklin. And then he said, "Those two men in San Diego; [182—96] and it is a way to make money; I would like to go with you down there to see them." And I told him that I have no time. And he said, "Well, that is all right, and when you have time I go down with you." And I told him that I might be able to find the time next week. He said it would be all right. And so we make the appointed time the next week but I forgot the day, and then he bought the tickets and make every pre-

(Testimony of Woo Wai.)

paration to go, and told me to meet him at Oakland Mole, or ferry landing—Oh, yes, at the—well, at the Oakland landing, to meet him there and also to meet his family; he bid his family good-bye there. Mr. Roy bought the tickets. We took a train and came to Los Angeles direct.

Q. (By the COURT.) Just a moment. Did you know when you left San Francisco what the character of this business was that you were coming down for?

A. He didn't say anything about it except that he said there is a way to make money to see the two men.

At Los Angeles he took my satchel or suitcase and his—had them took down to the Santa Fe depot from there and took me up to a restaurant. At that time I didn't know the place, only since the last few days I found the place; it was Levy's restaurant. He took me there. And then while we were there eating, he asked the proprietor of that establishment to see me, and then after we got through eating and he paid the bill. And then after the meal, and then he took me to a car to visit the ostrich farm, and also to a pigeon farm. We were visiting different places up to nearly two o'clock. Then he took me to the Santa Fe depot; procured tickets for San Diego. We got to San Diego about seven o'clock in the evening. He hired an automobile and [183—97] took me to a hotel. The hotel's name is Lanier. Mr. Roy signed his name to the register, and I signed also after him. Then from the room

(Testimony of Woo Wai.)

he telephoned to Mr. Conklin, and Conklin came up, and as soon as Mr. Conklin saw him they shook hands as good friends.

Mr. Conklin said—he pointed to Mr. Roy, saying that “This man is my friend, and then he is the man that secured my position which I am now in.” And Mr. Conklin gave me three or four cigars. He said, “Those cigars were smuggled from Mexico.” And then both Mr. Conklin and Mr. Roy laughed very loudly. Then in that place Mr. Roy and Mr. Conklin spoke about getting men from Mexico; they talked a good deal while there, but I didn’t assent to it.

Mr. Roy said that “I bring this man down here for the purpose to get the men from Mexico, and this man,” he pointed to Mr. Conklin, “will attend to the business down here.”

Q. Now, was that the first you knew of the character of the business you came down here on?

A. Yes, sir, that is the first time. While they were talking about this I said, “Well, it is very—that is very impossible, because I read the newspaper about the arrest of Chinamen for deportation in and about Los Angeles, and in this neighborhood; it is hard to do it.”

That was the first time that I knew what Roy had brought me down to San Diego for when he said that he brought this man down to see about bringing men over from Mexico.

When I said that this is a hard matter to handle because they were making arrests here all the time,

(Testimony of Woo Wai.)

can't do it, but Mr. Roy said, "Oh, do, don't—so much to afraid, not to afraid, because [184—98] he is a Government officer; he will attend to it, and after this I will bring you to see the head man of the office." Then from the hotel we started out. Mr. Conklin first, and then Mr. Roy followed, and I was the third on the way to a building. It was in the evening. I went in a building; I saw a sign at the door, written on the door: "United States Custom House," and then when we went into the office and Mr. Conklin was so kind he went and opened all the different doors. He said, "See here, there is nobody; here there is nobody, here there is nobody," pointed to the different rooms, and then Mr. Conklin went and locked the door himself. And then he locked up the door, and then he takes us over to the other room where Mr. Weddle was sitting by the table, and then Mr. Roy and Mr. Conklin talked about getting men over, that is talking over the same thing, as getting men over. Then the three there had made up a proposition for bringing the men over, and that the proposition was they to get \$50 for each man brought over. Mr. Conklin to get twenty-five and Mr. Weddle to get twenty-five. When the men brought over this way toward Los Angeles, and at Los Angeles they are to switch the officers, the inspectors at the different places.

Then I said, "I don't think the way will do; how can you do it? How can they come from on the other side? He said that he got the Mexican to take charge of him, to guide the men over. He said, and

(Testimony of Woo Wai.)

Mr. Conklin also said that he stationed himself in Tia Juana, and when the men come through that section, he will let them pass, and then to give the guide a sign, the guide has made. The sign to let the Mexican have a white handkerchief tied over his neck to be as a guide, and also have another sign, have a card written with two letters, H. S. By Mr. Conklin's request I wrote that card. (Indicating.)

[185—99]

Then all this matter was talked over by themselves. Of course, I listened to them, and then I said, "Well, it is not a business for me to do, because I have so much business up in San Francisco I can't come down here to attend from these matters." And then he said, Mr. Conklin and Mr. Weddle also said, "Well, if you have a friend which you can trust, or your clansman, that you can trust, you can bring him or them here, and we will tell him how to do." And then I said, "Well, perhaps you don't want a stranger, a man that is strange to you. And he said, "Oh, well, if the man is a man you can trust, we will trust him." After we were through that talk, Mr. Roy and I went over to the restaurant.

Q. (By the COURT.) Woo Wai, did you understand the proposition that was made to you by Weddle and Conklin and Roy in that room that you have described was against the law, for violating the law?

A. I know it was unlawful, but they said no danger. I have not mentioned that part yet, because they said if we didn't make the arrest we will let

(Testimony of Woo Wai.)

them pass it will be all right. You see at the time—when I mentioned about the newspaper reports, about the men being arrested and deported at that time, they talked about this matter. I said, “This is in violation of the law; it couldn’t be done.” And they said that, “Oh, well, if we make no arrest, who can make arrest?” And then we don’t want to go to jail, you don’t want to go to jail; and if you go to jail, we will go to jail.”

Then from the hotel Roy secured an automobile, took us to the train, and bought the tickets, and secured a sleeping berth, and we took the train back to Los Angeles the same night.

At Los Angeles Mr. Roy took me to the depot to go to San Francisco. There he secured the tickets for San Francisco. [186—100]

Before we left San Diego Mr. Conklin, Mr. Weddle, Mr. Roy, all their talking that when you get to San Francisco you must get a man; if you can’t come, you must get a man and bring the man down here, and that man who would trust.

Then three or four days after we got back to San Francisco Mr. Roy telephoned to me, “Why, it has been several days already. Have you found a man go down to San Diego yet?”

I said, “Wait a day or two; I will bring the man.” And then I secured my partner, business partner, Wong Chung and another Woo Mon Yin. And then I went to see Mr. Roy and said that I got the two men now to go; you better write to Mr. Conklin and Mr. Weddle to wait for them.

(Testimony of Woo Wai.)

That was in 1908. And then I took my partner, Wong Chung, and Woo Mon Yin. You see before we left San Diego for San Francisco Mr. Conklin gave me the address of his residence, everything, and numbers of the two telephones, to Home and the Sunset. He said that when they would come, "When you get off the train from the depot, you can telephone up to my house so I can come up to the corner to meet you." That is Mr. Conklin's. And then we got off the train at San Diego. Then I telephone to Mr. Conklin's house. He said, "Hello, I am waiting for you; come up."

We got on the car. When we reached Twenty-first street we got off. There is no light there, very dark. Mr. Conklin was stationed himself in a shady place, and whistled, and then I noticed him, and then he took us to his house, and then when we entered the house the house was without light, and then when we got in this house the steps were not even, and then I stumbled over almost. We got upstairs, second floor, and Mr. Weddle was there waiting. The door was locked up, and then begin [187—101] to talk. And then when we get into his room, and then they tell Woo Mon Yin and Wong Chung, said that "two or three hundred Chinamen down in Mexico, and you get them all over here to work, and pay the amount of money for each," what they want, and so on; they talked everything to the two men in that room. While there Woo Mon Yin asked how the men should come by what way can they come from Mexico up, and he said that to have

(Testimony of Woo Wai.)

a Mexican guide to take the Chinamen over, and then when they come to the place, the road—when they come to the place to tell the boys, the Chinamen and Mexican guide to walk on the railroad track, not on the road, because the road being sprinkled with sand, and then the inspector would tie a branch of tree—tie the tree on the horse's tail, and the horse walk ahead, and then the branch of the tree would sweep over the surface of the sand and make the road smooth; if any man walk over the road it would leave a track there, and the inspector would follow it up and arrest the men.

They they said, "Which of you going to Ensenada?" And then Woo Mon Yin said, "I would go." And then Mr. Weddle and Mr. Conklin said, "All right, if you want to go you come to my office, and I give you a paper to go." And then from there Wong Chung and I go back to San Francisco and leave Mon Yin behind to talk to them.

We left for San Francisco because I got other business to attend to. I don't like to handle this kind of work. About two days after we got back to San Francisco Woo Mon Yin came up to San Francisco, and then when Woo Mon Yin came to my place I said, "You go, you come back so soon?" Woo Mon Yin said, "Oh, no, I don't want to go, because that kind of business I don't want." And so he quit. And then Mr. Roy got a [188—102] letter from Mr. Conklin and Mr. Weddle saying that that man refused to go. Then it happened at that time Wong

(Testimony of Woo Wai.)

Yee came back from China. I am still talking about 1908.

Wong Yee called on me on a visit. He stayed to supper with me. After supper we were talking about one thing and the other and he said, "Well, I just come back from China; I wish I could find some business to do." I said, "Well, there is a way at that time might make some money; that is, there were two Government officers there, a friend took me there and I saw him; I don't know whether you want it or not." Then Wong Yee said, "Well, it might be dangerous; you would be arrested," and so on. I said, "I don't know; I don't think so, because they are Government officers. They told me that they would protect me, and they also told me, 'If you go to jail, I go to jail, too.' So you must not be afraid; if you want to go you can go down there and talk to them." That is the way that I talked to Wong Yee.

And Wong Yee agreed to go. So I went up and told Mr. Roy, and then Mr. Roy said, "All right, I will write to Mr. Weddle and Mr. Conklin." I gave him the address of Mr. Conklin's residence and telephone number to Wong Yee.

After Wong Yee came back I saw Mr. Roy. I told him.

I never saw Mr. Roy after July, 1909.

Q. (By Mr. CAMPBELL.) Now, during the time of 1909, did you see Roy up to July or August, 1909?

A. Yes, sir, I saw him before July and August. He wanted me to take Wong Yee, or Wong Chung,

(Testimony of Woo Wai.)

the other Chinaman, and go down again. How I make money and bring the Chinese into Ensenada wait for Conklin, and wait for us. He say so.

After July or August, 1909, after I didn't see Mr. Roy any [189—103] more, I got letters from this man, Mr. Conklin, several times—wanted me to go down. I think it was the last part of February or March, 1910.

Q. What became of the letter or the letters?

A. It was burned. I want to explain the whole thing between him and myself to the Court and jury. I burned it myself, in Chinatown, in my house. I did so because of my instruction to Mr. Conklin and Mr. Weddle while Wong Yee, Wong Chung and myself were in his house saying that whatever letters were between us we must burn them, because the writing will be between the two officers and myself, and handling the men being by Wong Yee and Wong Chung, and the letters must be burned; they always burn mine, and I would burn his.

I got letters from Mr. Conklin after this letter. There is one here in court, right in court here.

I was in Jack's restaurant with Mr. Conklin several times. A letter was produced there. I showed him a letter. He took it back. It was, I think, about November; it was in the latter part of the year 1910. He said, "Why didn't you burn that?" And then he took it.

After receiving this letter of February or March, 1910, I went on to San Diego about April, with Wong Yee and Wong Chung.

(Testimony of Woo Wai.)

This letter dated March 31, 1910, beginning, "Mr. Conklin, My dear friend," was written by me after I received the letter from Mr. Conklin in February or March, 1910.

In Mr. Conklin's letter it said that he has not seen Mr. Roy for some time. He asked where he was. And in reply I said, "Mr. Roy in New York."

We saw Mr. Conklin and Mr. Weddle at that time, at Mr. Conklin's house. [190—104]

We three were all in his upstairs. The same thing took place between us. They told us to go down there to get the men up and then told Wong Yee to go down to Mexico and told Wong Chung to go to Orange and different places to hunt up places for the purpose to receive the men.

Conklin was the man that show Wong Chung the railroad map about different places; and also he draw, too, on a paper about Orange, where the Chinese laundry was; and he also told the name of the Chinaman in Orange, and about the garden, and so on; and he told us of a big bad dog in that place—in a certain place. "You are to go around to avoid it." He said he had friend at Santa Ana, friends in Oceanside, and then he going to transfer the inspector to different places. He said all these things. He say, "Had it not been for his deceiving or coaxing he would not do such a thing."

Q. (By the COURT.) How did you and Wong Chung and Wong Yee happen to go down to San Diego on this occasion you are talking about? Turn around and tell the interpreter.

(Testimony of Woo Wai.)

A. Because he written to me. I received a letter from him.

Wong Yee agreed to go to Ensenada. Next day Wong Chung took the advice of this Mr. Conklin, get off at Orange to inspect the places where Mr. Conklin indicated. And then while we left, Wong Yee stayed there to wait for their instructions to Mexico—to Ensenada. At the house of Mr. Conklin on that night he said the men down there waiting to come, down in Ensenada, and the farmers in Los Angeles and San Diego need Chinamen. He said, "There is an American doctor bringing in about twenty Chinamen every month. I will catch him bye and bye. And if he catch him, then let our men come this way." He said he went down to Ensenada all the time; he take the Government boat [191—105] and go down there.

Then after that we got six men got over, and after six men got over I went down there to pay him. I saw them both there. When the six men were come I written to him and I got reply from him. That was in September, 1910.

I went into the house. Mr. Conklin and Mr. Weddle were there. The door was closed, the curtains down. I paid him for the six men, \$50 each, \$300.

Then they said that, "You people go slow, for all this time you only got six men over. We have to find a way that you can do easier." He then stated, "You come down here to bring us \$300, and it costs you expenses." He said, "I am sorry for you."

(Testimony of Woo Wai.)

Then there he gave me \$40 for the expenses to come down. That \$40 was of two twenty dollars piece of gold. Then, after he paid me the two twenty dollar pieces, right there he asked for one of the twenty dollar pieces change for the two tens. And then right there Mr. Conklin and Mr. Weddle divide the money, each get \$130, right there before me. Put it in his pocket. Mar Jick was with me that time but when the money was handled Mar Jick was not there. I came back to San Francisco the next morning. After that time of the payment of this money I never saw Mr. Weddle before I was arrested, but I saw Mr. Conklin after that time. He came to my house in San Francisco. He came to my house four times.

Q. Well, now, just—I will get at that, if you will just hold your peace, Mr. Woo Wai.

A. (Without the interpreter.) Oh, I get mad. He puts me the job on me. [192—106]

After paying the money in San Diego I first saw Mr. Conklin in my house in November. Wong Yee and Wong Chung brought me a letter, say there is eight men about coming and so I give to him—

Mr. Conklin and I talked about those men coming. He said that he will find an easier way. He knew a man by the name of Jock, he got a gasoline engine boat, he can bring the man up by boat. He said, “You don’t get the Jake. Jake is my man. I am going to see him—attend to that part.”

He said that if one of the wheels or propeller of the boat being broken. He came to me and asked

(Testimony of Woo Wai.)

me for a hundred dollars to fix that boat, the propeller. I gave it to him and he returned it back to me the next day. He say he got money. At that time I met him at Jack's restaurant. He told me in Jack's restaurant the same thing, over and over again. I can't remember it all—all those talks.

I did not know that Mr. Conklin was coming to San Francisco in November or December, 1910, until he got there. He telephoned to my house. When I took up the receiver I asked who he was. He said he is "R. L."

Q. Explain why it was that you understood what "R. L." meant.

A. That is his name—the name he gave to me. That is the way I address to him. The initial I gave in writing to Mr. Conklin was "H. S. W. W."; that is the agreement between himself and I.

When Mr. Conklin was at my house my wife and my son and daughter were there. Mr. Conklin brought one box candy and a monkey, and a top to my children. He also gave me a cigar-holder (showing). And I gave him some silk to him, and gave some to Mr. Weddle in care Mr. Conklin. He exhibited two cigar-holders. He said, "The two are alike, whichever you choose, take one." Then he presented the candy and the other toys to my little girl and he put his hand kind of [193—107] smooth on my little girl's head, saying, "Good little girl."

Then after that he said, "You tell Wong Yee and Wong Chung not to be worried, and I will fix them

(Testimony of Woo Wai.)

coming over all right. You tell them to go to San Bernardino and I will fix it for them.”

Cross-examination.

(By Mr. STEWART.)

Q. You saw Mr. Roy at your house, and then he took out the memorandum-book with Weddle and Conklin's name on it. Now, was it September or October?

A. It was this; it was in the last part of September, met Mr. Roy in Mr. Carpenter's office.

The WITNESS.—From there we went to his (Roy's) house, and while in that house he showed me the name that appeared on that book of his, and then we started down in October. Mr. Roy told me they were his friends. He didn't say they were inspectors.

Q. The first time you went to San Diego you didn't know what you were going for, did you?

A. That is all, because Mr. Roy said that he had friends down there and had big influence, and he would pay my fare to go down there to see him, along about June when Roy's daughter married I gave him a present of a table that cost forty dollars.

Q. (By the COURT.) Woo Wai, how did you come to go away down to San Diego with Mr. Roy without any knowledge or idea of what you were going there for?

A. I went down there on account of this: That he said, “Woo Wai, you have been living here thirty years or more and have not been out anywhere. You had better come down and see Los Angeles and San

(Testimony of Woo Wai.)

Diego, and there is a way to make money. You come down there to see the parties. Likely you can do it. And if you don't, you don't need to. Come down anyway. I will pay your expenses for coming down." [194—108].

Q. Didn't it arouse your suspicions to have a man offer to pay your expenses for the trip that you knew nothing about?

A. Well, it did not, because he said we were friends. It was expensive for me to come down there. He said simply to come down to see the country and see what was in it.

Q. Well, when you heard these officers, these government inspectors, talking with Mr. Roy about violating the law, allowing Chinese to be smuggled in, and they took some money for it, didn't you think that they were a pretty dishonest and corrupt lot?

A. Yes, I have a suspicion on that. But the Government officers they are willing to do it, and I am a Chinaman, and when they want to do it, why I would go in with them.

By "De Wanter" in my letter of Nov. 23, 1910, U. S. Exhibit 15, I mean Tia Juana. Wong Chung gave me the first information I had that seven or eight men were coming to the United States; he got a letter from Wong On, which I think I saw.

Mr. STEWART.—Why do you say that you have eight men, and down here you say, "My men have H. S. Mark"? Why do you call them "my men"? (Handing document to witness and indicating "my men.")

(Testimony of Woo Wai.)

A. I not very intelligent with the language. I might express "our men"; and it is just our men.

[Testimony of Wong Yee, for Defendants.]

WONG YEE, called as a witness on his own behalf and that of the other defendants, testified as follows:

My name is Wong Yee; I live in San Francisco and I have lived in California over forty years. I know Mr. Conklin and Mr. Weddle. I saw them in San Diego in the year 1908. I had come back from China a couple of weeks. I meet Woo Wai. He say: "What you do now?" I say: "Well, I come back, I want to get some business." [195—109] Woo Wai then say: "Well, I got some business for you. I got a friend at San Diego, an inspector in chief, Mr. Conklin." I say: "What kind of business?" He say: "Well, Mr. Conklin he told me wanted me to get somebody to go to Ensenada to try to get some Chinamens to bring in the United States." I say: "It is dangerous job." Woo Wai say: "You not afraid—Mr. Weddle, Mr. Conklin protects. Mr. Conklin he look them on the road, horseback. He fix it for me, I have talk to him already. You no believe, you can go to San Diego to talk to him." So Woo Wai told me how to get to Mr. Conklin's house. He gave me the number and telephone address and where to take the street-car. So I go to San Diego and I telephone to him. That was December 9th or 10th, 1908. [196—110]

I telephoned to him. He was answer to me. He say, "Mr. Conklin not home. You come up about

(Testimony of Wong Yee.)

half-past seven to eight o'clock. I get on the cars and go up to Twenty-one street, and he meet me on the corner of the street. I get out the low side. He out the other side. And he see me get out the car, and I walk right through and he walk right through, the other side the street. So I walk right through one block. He lived the house just about the corner. Just I go across the street the corner then he walk right through on the street, come meet me, together. "What you name?" I say, "Wong Yee." "Where you from?" "San Francisco." "All right. Who send you up?" "Woo Wai."

He open the door, he take me up second floor, one of the sit rooms. And I see Mr. Weddle.

He ask me, "Woo Wai talk you what he send you up for?" I say, "Well, I met Woo Wai; he say he fix it. The friend of Woo Wai, Mr. Conklin."

Woo Wai tell me that Conklin tell him to try to get the men through. He say: "Woo Wai, he told you that?" I say, "Yes," but that I fraid; I no want to go that kind business. "Well," he said, "I the Government. I protect you. No fraid you." I say, "Well, I don't know. I never try that kind of business." "Oh, yes; all right. I fixed everything Woo Wai already. You go through; I heard about two three hundred men Ensenada, and you going to bring some men and make some money very easy." I said, "All right. Very dangerous for that thing." He say, "Oh, you not afraid. You can bring some men and pass along and I let you men off. And you find a house the other side, the men how he

(Testimony of Wong Yee.)

coming. And I heard one man named Dr. Sam. You go down there and you not had Dr. Sam make them coming." But I don't know any Dr. Sam. He say, "Well, you go down there to Ensenada, find out." [197—111]

I say, "Well, I didn't feel much like that kind business." He say, "Oh, yes; you go. You make some money very easy there." I say, "How much you fix it Woo Wai you charge this?" He said, "Fifty dollars piece bring some men over there they pass the line." I say, "I can't bring the men. I don't know which way go." "Well, you go down Ensenada; ask you friend, ask you cousin that lives away there; and you can leave word there he can send some bodyguard and the Spana men, and get in United States, and I can send—you can send them down San Francisco." "Well," I say, "we have so much inspector watch all the station everywhere. How can they pass?"

He say, "You try get some man to bring over, and pass the line and I put my men away on the station, nobody watch you men, you can come along right through to San Francisco." I say, "Well, I don't know I can get or not." He say, "Better you go down to try." "Well," I say, "all right."

Next day I went to the custom-house to Weddle, the officer there. I say, "Mr. Weddle, you want me go down Ensenada." So I hand him my certificate. He say, "Oh, I don't care very much about the certificate." I say, "I no leave the certificate here how I can come back?" He say, "Well, I give you per-

(Testimony of Wong Yee.)

mit." He write a card. "All right. I leave that certificate here anyhow." And then I leave it on the desk and he give me that permit and I say, "All right. I go to-morrow. He say, "You go to De Wanter, from about nineteen miles. In the morning, nine o'clock, the train." I say, "All right." As I come out, he say, "You stand across the street, and eight o'clock you wait here." I say, "All right." The night-time, at eight o'clock he gave the papers back to me. He say, "I don't want them."

That is the card he gave me. [198—112]

Mr. CAMPBELL.—(Reading:)

[Defendants' Exhibit "D"—Card.]

"Mr. Harry Hadley Weddle." (That is his visiting card, evidently.) "Permit Kee Ying to pass to Mexico and return." Then comes in the "Mr. Harry Hadley Weddle, Inspector in Charge."

(It was introduced in evidence and marked Exhibit "D" of Defendants.)

I ask Weddle, "That permit let me to pass?" "Oh, yes, I telephone my man already."

He told me, "You go to-morrow."

I take the train to Tia Juana. I want pass the other side. And one inspector ask me, "Where you go?" I say, "I go Ensenada." "What you name?" "Wong Yee." "Well, you pay me your package over here. I will examine it." He examine my package and ask, "Well, what you from?" I say, "The San Francisco." "How old you?" "So many year." "Where you go?" "Ensenada." "How long you going stay?" "I can't tell. Couple

(Testimony of Wong Yee.)

day, maybe." "All right. You sign you name on the book." I sign my name on the book and he let me go.

Mr. Conklin told me: "You go by the road on the stage. They carry some letter, maybe couple people pass on the stage."

So I go the postoffice and ask, "I can go to-day? Have you got room for me on the stage?" He say, "No." Next day I ask again. He say, "No. I engage one man already. You want to hurry you hire the wagon. Somebody take you down." Then I went back to lodging-house and that man that own that lodging-house take me down to Ensenada in a wagon with one other man.

I be down Ensenada I total stranger; nobody know me. But I went to Chung store and I talk about doing some business. He ask, "Well, how you come pass, anyway?" "Oh, I have got a letter, I have got a certificate." [199—113].

He said, "What kind of business you want to look?" "Well, I got friend in San Diego he want me come here can send men up past the United States, and he can let them off, and pay so much expenses for him." I told that to Hing Chung and Yee Lun also. I tell him I got friend for San Diego; he inspector charge, and he tell me come here and try get some Chinamen, bring them over United States. Everybody say, "How much you charge?" I say, "I charge three hundred dolla, all gether."

Q. (By Mr. CAMPBELL.) Now, then, how did you arrive at the figure of \$300?

(Testimony of Wong Yee.)

A. Well, Mr. Conklin, Mr. Weddle. Mr. Conklin say, "You get three hundred dol. You pay some men to take over, and you make some money, you make lots money."

When I speak to these Chinamen at Ensenada, he no say anything me; he laugh. And he say, "I no believe you try get some Chinamen pass the land. I think the Government send you over here find out how the Chinamen pass the land." I say, "Sure. I not fool you people." He say, "Well, I no believe you that. Nobody in the town. You see this town here. Only a very few people here." Then I went out some other store—he would not talk me. I come over other store—he would not talk me. He think I work for Government. Then I stay there two days and I come back.

Q. Did you find any two or three hundred Chinamen in Ensenada that wanted to come over to the United States? A. No, Mr. Conklin tell me that.

So I come back on stage. I get back on San Diego. I go Mr. Conklin's house. I say, "Mr. Conklin home?" Lady there say, "Not home." "Well, tell him eight o'clock I want speak to him." And they say, "All right." In the night-time I went up to [200—114] his house; he lift up the window, he stand up his head out the window; he look to me to come. I just pass across the street and he say, "Hello." Then he come down and open the door. He take me up the second floor, the same room I meet him before; and I see Mr. Weddle he sat down there too. "Well, you been Ensenada,

(Testimony of Wong Yee.)

you find Chinamen want coming?" I say, "No, I no see any men there; very few men in there." He say, "Oh, yes, plenty men there." I say, "They fraid I work for Government. Nobody like talk me. I total stranger." So Mr. Weddle, he say, "Well, that is too cold this time to bring the men over to walk. Maybe he get die on the road. You better go next summer." I say, "I no like to take that kind business." "Next summer I send you the word," Mr. Conklin tell me. "Where you the number?" I give the number for him, so and so, and he put down my place, and say, "Next time I send you the word. Next summer you go again." I say, "I don't want to go." "Oh, yes, I am the Government, and I am your friend. You shut you mouth." He told me, "You know Dr. Sam?" I say, "I don't know him. I hear Suey Sam; I hear something like that." "That is the man. That man bring in so many Chinamen pass the United States. That son-of-a-bitch, I catch him and I break his neck."

Then I say, "I no want to do this kind of business." I say, "I didn't feel like it, this kind business—go against it." He say, "Oh, well, I protect you. I the Government. What you fraid? You shut you mouth all right. Everything I fix it with Woo Wai already. You keep your mouth, everything all right." I say, "Well, I won't talk; I won't say anything."

Then, tomollow morning, when I go down the city, I see Mr. Weddle stand on the depot. I get in the car. I say, "Good-by." [201—115] He say,

(Testimony of Wong Yee.)

“Good-by,” and I come down Los Angeles and I stay one day and then I go down San Francisco.

That was in December, 1908, ninth or tenth.

In August, 1909, Woo Wai told me: “Mr. Conkin send a letter down to me. He want me to send you to go to Ensenada again. He say, ‘You fellow too slow. Why don’t you send Wong Yee to go again?’ ” I reply to Woo Wai: “Oh, I don’t want to go now.”

In April, 1910, Woo Wai told me he had received another letter from Conklin, telling him that we were too slow, that we should hurry up and sent me over to try to get men, and asking “Why don’t you make money?”

I went down to San Diego again in the year 1910 with Woo Wai and Wong Chung. We saw Mr. Conklin and Mr. Weddle at night in Mr. Conklin’s house. Mr. Conklin told Woo Wai, “You send Wong Yee again Ensenada.” I say, “Well, I get fraid; not much like. Everybody no believe me. They think I work for Government; I fraid.” He say, “Oh, yes; you better go. Now, got the men there; got two three hundred men there. You go down this time, you can send some mans up.” And I say, “Well, I will see. I didn’t feel much likee go.” He says, “You have to go. You make some money.”

Q. (By the COURT.) If you were afraid, why did you go down there again?

A. Well, I didn’t feel much like go; and he say, “They got the men there. You can get some man and make some money.” Woo Wai was with me,

(Testimony of Wong Yee.)

Mr. Conklin, Mr. Weddle. "He protect me. You not afraid. You lots make money."

And I talked to Mr. Conklin and say, "Well, suppose I go Ensenada and I send a man to pass on the line, how you know that it was my mans? You say that Dr. Sam send mans all the time, and [202—116] suppose I send a man come up and you no know which mine and which Dr. Sam's?" He says, "Bring them over. Well, I tell you, you put H. S. on the card put in the pocket, put one white handkerchief on the neck; tell the bodyguard they put one white handkerchief on the neck and put the card on the pocket and no let anybody [203—117] know. Suppose he come pass the land he meet our inspector, you show him the card 'H. S.' and I know you men, I let him pass; and suppose other mans no got 'H. S.' no had white handkerchief on the neck, I catch him, put him in jail. That is all right." "Well, suppose how the man he can pass?" "Why, you tell the bodyguard to bring pass in some hill, walk right through on the hill, in the night-time he can walk, daytime he get in the bush and tell him sleep in the daytime. Tell them to talk on the railroad track, and not on the road. They make tracks there to be seen."

He talk to Wong Chung—to Wong Chung he say, "You know Orange? There is a Chinaman there; keep a vegetable garden. Maybe you can hide your mans in there. From Orange change car, go San Bernardino. You can go San Bernardino, you can take the man the pass on the other side of the rail-

(Testimony of Wong Yee.)

road company, the Santa Fe Company. You can get down there. Over there is no inspector at all." He mark these places and also Redlands on a paper. To Woo Wai he say, "Well, suppose Wong Yee he got a man, sent a man pass the land, and I let you know; you send officer away." He say, "Oh, yes. Suppose you got a man coming, you let me know one two day what day you man come I send my office away." I say, "Well, you got some office in Los Angeles to watch on the depot?" "Well," he say, "that is my mens. I can send him anywhere—down Long Beach, San Pedro." Mr. Weddle was there all this time.

Next day I went up to the custom-house for the permit from Mr. Weddle. He say, "Oh, no, No you talk." He held the hand not talk. He say, "Well, you want go Ensenada, you make out a certificate. You can go by the boat."

Mr. Conklin stand in the office there. [204—118]

He called me out the door on the hallway and say, "You can not go by the road." I say, "Why?" "Well, Mr. Weddle he told me, he say one inspector, one China inspector, he go by the road yesterday. He had a *audobil*, and something *bloke*. Send a man to come back to buy the iron for the *audobil*. And suppose you go by the road, then you meet him bad luck, be too much scared, be very scared. You go down San Francisco. You go by the boat." I say, "All right."

Next day I go down to San Francisco, and I make out merchant's certificate. On June 15, 1910, I start on the boat, and I go Ensenada. I stay about ten

(Testimony of Wong Yee.)

days. My eyes get hurt; I have a sore eye; I lost the sight of that eye. I saw Wong On there—I tell him: “I from San Francisco. I got a friend Woo Wai. Woo Wai, he can make his San Diego inspector charge you can send the mans go to United States and pass the line and you have no trouble.”

Wong On say, “Well, I don’t know. I got mens enough. Maybe I got it I send a letter to you.”

Q. (By the COURT.) Did you ever hear from Wong On after that, after you got back from Ensenada?

A. Let’s see. I get back a little over one month, I hear they had sent a letter for Wong Chung. I not see it. Wong Chung, he get told me. He say Wong On he sent six men come from Ensenada. Wong On knew about Wong Chung because I told him. I told him Woo Wai, Wong Chung, me, and I meet in San Diego. Mr. Conklin and he talk all about that.

Q. Why did Wong On write to Wong Chung instead of writing to you, who had been there to see him?

A. I tell him, “I get a bad eye. You want send a letter, you send to Wong Chung. He live in Oakland.” And I gave him Wong Chung address, and I tell him, “I have a bad eye and I [205—119] would quit that thing; I no can attend to that business.” After that I did not have anything more to do with the matter.

I know Mr. Birmingham, the man who arrested

(Testimony of Wong Yee.)

me. One morning about half-past ten, I go down to Oakland. I get on the train on the Giant Station and come down to Richmond. I get out the train at Richmond. And I get in the train and I see Mr. Birmingham. I say, "How do you do?" He say, "How do you do?" And he called me and get on the train and go down to Richmond. I get on the train. And he see me get out the train and he get out the train too. And then I go in the street-car and go down to Oakland—cable car; and he come with me to get in the car too, and go down the county line to change the car. Then I get on the car, he get on the car. He say, "Hello, Wong Yee." Say, "Where you go?" I say, "I want go down Oakland." "Come and take a drink," and called me. I say, "Oh, I need not drink much." He say, "Come on, take a drink with good friend." "All right." We go in the saloon to take a drink. I say, "I pay the money." He say, "Oh, never mind. I call you. I treat you," and he pay the money. And I step out and he come with me together to step outside the porch. Walk about five step, and he say, "Wong Yee, you got into trouble for the Government." I say, "Yes, I know." He say, "You know what I am?" "Why, you my friend." "And look at that." He opened—he showed me the star. "Well, I know I have been in trouble for the Government."

Q. (By the COURT.) How did you come to say that you knew that you had trouble?

A. Well, I heard them say, "Arrest Woo Wai,

(Testimony of Wong Yee.)

arrest Wong Chung"; everybody say, "Bye-and-bye they come and arrest you too." I say, "Well, I can't help, they arrest," And I just think so. [206—120]

And he show me the star and say, "You better go down the San Francisco with me," and "Who your lawyer?" "Tell your lawyer, and get a bondsman, and try the case in the court and get clear, that be better." I say, "All right."

We pass on the yellow boat, the Key Route.

And he say: "I take you below to that saloon." And he take me on Montgomery Street—one saloon there. And he sent the word down to the custom-house one inspector come up to that saloon. He say, "What you name?" I say, "Wong Yee." "You the Wong Yee?" Aha; I catch you—all right. You come with me."

Q. Now, did you ask Mr. Birmingham to let you go for \$500?

A. Never such thing. Never say that word.

The COURT.—Did you say to him you were an old friend, and let you go, or anything of that kind?

A. No, he did not say.

Cross-examination.

(By Mr. STEWART.)

Q. When was the first time you went to San Diego?

A. December 10 or 9, 1908, I couldn't tell what day.

Q. Weren't you in San Diego on November the 16th and 17th, with Woo Wai and Wong Chung?

A. No.

Q. Well, weren't you there on November 15th or

(Testimony of Wong Yee.)

16th with Woo Wai and Wong Chung?

A. 17th or 16th?

Q. Yes, 15th or 16th, or somewheres along there.

A. When, 1908?

Q. Yes. A. 17th or 18th.

Q. Yes, November. A. No.

Q. (By the COURT.) Wong Yee, then you never had seen Mr. Conklin or Mr. Weddle, or had a letter yourself from either of [207—121] them before the first time you went to San Diego?

A. Never.

Q. You went there at the instigation of Woo Wai, did you?

A. Well, after Mr. Woo Wai sent me the first time in December, 9th and 10th, that time, the first time I went up to San Diego, I saw Mr. Conklin and Mr. Weddle the first time.

I didn't tell Mr. Conklin and Mr. Weddle at San Diego that I had a friend at Ensenada before I went down. I didn't tell them that I had a cousin there. I went down to find if I got any cousin or not; I couldn't tell.

Wong On belongs to the Wong family. That is the same family I belong to. I have only known him since that time I went down.

[Testimony of Wong Chung, for Defendants.]

WONG CHUNG, called as a witness on his own behalf and that of the other defendants, testified as follows:

I have lived in San Francisco more than ten years. My business is merchant, storekeeper. I know Mr.

(Testimony of Wong Chung.)

Conklin and Mr. Weddle. In the month of April, 1910, I was in San Diego with Wong Yee and Woo Wai. I saw Mr. Weddle and Mr. Conklin there in Mr. Conklin's house. It was in the night-time about eight o'clock or half-past eight. Mr. Conklin had some talk with us. He said, "You boys are too slow; you ought to go faster."

Q. Too slow about what?

A. Saying that to get some men from Ensenada.

Mr. Conklin was sitting by the table. He got a paper and drew up the locations of different towns relating about Red Lands, Orange and San Bernardino and about the troubles of the different trains going to those different places, and pointing out to me. He got a map of the railroad, paper from the railroad, table, time-table, pointing out where the different stations or different towns were. And then he had an envelope, a paper something like [208—122] an envelope on his desk. He marked out; he said, "Here is Orange," marked Orange, "and then you get off here and go up; towards that way is Chinatown, and then you go along the other way; across the bridge you will find a Chinese vegetable garden." He pointed to me about the vegetable garden; told me to get off the train along that direction to the garden, and tell the Chinaman to receive the Chinamen that are going to be brought there. After I went to Orange and saw the place, I didn't keep any longer the paper.

(Testimony of Wong Chung.)

Cross-examination.

(By Mr. STEWART.)

Q. Do you understand English pretty well?

A. I can't understand very—I don't understand very much, but I understand more of the hearing than speaking.

Q. Yes. Well, how did you know what Mr. Conklin said when you were at his house in San Diego?

A. Well, I can understand what he said.

The WITNESS.—(Without the interpreter.) I can't speak it; he talk it, I understand it; he talk it, I understand.

Q. You can talk English when you want to?

A. Some I understand. I ask Woo Wai, I ask Woo Wai what he say. He tell me to go to Orange, and he told me to go what way, and what side to look and to go to vegetable garden and the big dog there, "You look out that big dog" like that.

Witnesses for Government in Rebuttal.

[Testimony of Donaldina Cameron, for the Government (in Rebuttal).]

DONALDINA CAMERON, called on behalf of the Government, in rebuttal, testified as follows:

The WITNESS.—I have lived in San Francisco seventeen years, and have known Woo Wai that long. I am engaged in Mission work, among the Chinese women and girls. I have discussed the reputation [209—123] of Woo Wai with people who live in Chinatown, and am acquainted, to some extent, with his general reputation in the community where he

(Testimony of R. L. Conklin.)

lives, for truth, honesty and integrity. It is not good.

**[Testimony of R. L. Conklin, for the Government
(in Rebuttal).]**

R. L. CONKLIN, recalled on behalf of the Government, in rebuttal, testified as follows:

The WITNESS.—I never wrote a letter to G. M. Roy, nor have I ever received a letter from him. I never told Woo Wai to destroy letters he received from me. I did not tell Wong Chung at the meeting in my house in April, 1910, to go to Orange. There never was anybody at my house with Woo Wai, except Wong Chung, Wong Yee and Mar Jick, and I never heard of anyone named Woo Mon Yin in the transaction. I may have given Woo Wai a cigar, at the meeting between Roy, Woo Wai and myself in the hotel, October 26, 1908, as at that time I smoked, and usually carried cigars in my pocket, but I never told him they were smuggled.

[Instructions of Court to Jury.]

The Court instructed the jury as follows:

Gentlemen of the jury, if you will give me your attention now for a short time, I shall proceed to submit to you the principles of law that must govern in your consideration of the evidence in this case for the purpose of reaching a verdict, and when I have done so it will be your obligation under your oaths to observe the principles that I submit to you as those which must control this case. Whatever differences there might exist and be found by you to exist in the

minds of any of you as to your own ideas as to what the law is, will have nothing to do with this case. The law provides that the law must be submitted to the jury by the Court. That, among other considerations, [210—124] springs from this: that it is a tangible source from which the law that governs the case is given, and it is to be given so that if an error is committed it is always susceptible of being corrected in a higher tribunal; whereas, if the jury were permitted to undertake to decide the case in accordance with their own preconceived ideas of the law, ideas unknown either to the counsel or the Court, there would be no means of correcting any error that their judgment might have led them into by following such principles; and, therefore, it is your duty, under your oaths, to obey the law as given to you by the Court, whatever your individual ideas may be upon the subjects involved. I suggest these things in view of some differences that you will observe as you listen to the instructions of the Court that exist between counsel and the Court as to the law that should govern this case. Of course, counsel are entitled to advance and insist upon the reasonable ground of their view of the law. The obligation and duty rests upon the Court to determine what the law is, and by that the jury is bound. As I suggested, if in giving you the law, in accordance with my assumed knowledge of it, I commit error, then, of course, there is a perfect remedy for the party who is injured thereby to have it corrected.

The defendants are charged with conspiracy. I need not recite the contents of the indictment at

length; it has been read to you and you are familiar with it. In appropriate terms it, in legal effect, charges the defendants on trial, Woo Wai, Wong Chung, Wong Wing Sai, and Wong Yee, and certain other parties with whom we are not here concerned, with having at the date alleged knowingly, intentionally and unlawfully entered into a conspiracy to commit an offense against the United States, in violation of Sec. 37 of the Criminal Code of the United [211—125] States, that is to say, a conspiracy to then and there bring into and cause to be brought into, and to aid and abet the bringing into the United States by land from Mexico, of Chinese persons not entitled to enter the United States and known to defendants not to be so entitled. Certain overt acts, that is, open and manifest acts, are then charged to have been committed by the defendants and others in pursuance of such conspiracy, and for the purpose of carrying it into effect. In that regard it is alleged in substance that Valenzuela, Gonzales and Sias, defendants named in the indictment as parties to the conspiracy, but not on trial, brought or conducted a certain party of eight Chinese not entitled under the law to enter the United States, from Ensenada, Mexico, to San Bernardino in this District, and that at the latter point the defendants Wong Chung and Wong Wing Sai took charge of certain of these contraband Chinese to conduct them to their destination. These are in substance the allegations of the indictment so far as necessary here to state them.

Section 37 of the Criminal Code alleged to have been violated by the acts complained of, provides that

if two or more persons conspire to commit an offense against the United States, and one or more of the parties do any act to affect the object of the conspiracy, each of the parties to such conspiracy is guilty of an offense; and the statutes of the United States provide that any person who knowingly brings into or causes to be brought into the United States by land or aids or abets in so bringing in any Chinese person not lawfully entitled to enter the United States, commits an offense against the law. The bringing unlawfully into the country of Chinese persons not entitled to enter therein is thus made an offense and such offense is within the provisions of Sec. 37 above referred to, making a conspiracy to commit it criminal. [212—126]

As based upon the facts charged in this indictment, a conspiracy is a combination between two or more persons to do a criminal or unlawful act. A common design between two or more persons is the essence of the charge. It is not necessary, to constitute a conspiracy, however, that the parties thereto shall meet and enter into an explicit or formal agreement for an unlawful scheme, or that they shall directly by words or in writing state what the unlawful scheme is to be. The combination or common design may be regarded as established if the jury find that the parties charged were actually pursuing, in concert, the unlawful object alleged in the indictment, whether acting separately or together, or by common or different means, providing all were contributing to the same unlawful result.

Neither is it necessary that it shall appear that all

of the parties originally combined together, or that each was an original contriver of the mischief. If it is shown that there was in the beginning an unlawful agreement to do the acts charged between two or more of the defendants, and that at any subsequent time a new or additional party came into the conspiracy for the purpose of aiding in the accomplishment of the original plan, and does any act in furtherance of the original design, he is from that moment a fellow-conspirator and responsible for all the consequences which flow from such participation. While it is not essential that each conspirator should know the exact part which every other conspirator is to perform, you must be satisfied that a party charged with participation in any of the steps taken in furtherance of the original scheme had knowledge that the parties whom he was assisting were engaged in the same unlawful design. Such knowledge may be inferred from his conduct [213—127] if the acts proved are of a nature to satisfy the jury that he was aware of the fact that the parties with whom he was associated in the transaction were engaged in wrongdoing. Where an unlawful end is intentionally sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, purposely work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a principal in the conspiracy, although the part he was to take therein was a subordinate one or was to be executed at a remote distance from the other participants. It is not essential to the guilt of the defendants that the conspiracy prove

successful, or that its specific objects be accomplished, so long as some overt act charged in the indictment was done by either of the parties to the conspiracy for the purpose of carrying the same into effect. Furthermore, where several persons are proved to have combined together for the same illegal purpose and with the same object in view, the law is that any act done by one of the parties in pursuance of the preconcerted plan and with reference to the common object and to effect the object of the combination, becomes the act of each party thereto, and evidence of such act is admitted as evidence against all of the others who are engaged in the same conspiracy. While the declaration of a co-conspirator cannot prove the existence of the conspiracy itself, yet any declaration or statement made by one of the conspirators during the existence and in furtherance of the unlawful combination, when established, is not only evidence against him, but is evidence against the other conspirators, who, if the combination is proved, are as responsible for such declarations or statements as if made by themselves. [214—128]

The formation or existence of a conspiracy may be shown either by positive evidence, such as declarations or writings, or by circumstantial evidence, such as showing that the parties charged acted in concert in committing the alleged overt acts, or under circumstances warranting the inference that their acts were the result of previous understanding or arrangement between them. The existence of a conspiracy may be manifested either in words or in deeds. In this case, therefore, even though you may not find

that there was any open or express declaration of purpose on the part of those concerned to unite in doing the act charged, yet if you find that the acts of the defendants were committed or accomplished in a manner or under circumstances which, by reason of the situation of the parties at the time and the conditions surrounding them, give rise to a reasonable and just inference that it was done as the result of a previous agreement or understanding between them, then you will be justified in finding that a conspiracy existed to do the act. Nor is it necessary in the formation of a conspiracy that all of the parties thereto shall actually meet together at one and the same time or place and discuss the means of carrying its object into effect, or in any formal way agree upon the methods to be pursued in accomplishing such design. A conspiracy may be and frequently is formed and carried out without the express declaration of its purpose by any of those concerned, which in itself would necessarily tend to show the existence of a concerted purpose; and yet when taken in connection with the acts of the parties, or when the acts themselves are considered independently of any such declaration, the existence of the conspiracy may be made clearly to appear. It is sufficient if the circumstances shown satisfy you to the extent I shall instruct you that the parties thereto [215—129] were acting together towards a common end, and that that end was the illegal act or thing charged as the object of the alleged conspiracy.

The burden of proving a criminal charge is on the Government, and it is not necessary for a defendant

to offer evidence in disproof of any allegation of the indictment until the facts proven are sufficient to establish his guilt. Before a conviction can be had, it is incumbent on the Government to prove the guilt of a defendant by evidence which satisfies the minds of the jury beyond a reasonable doubt, that is, by evidence which produces in the minds of the jury an abiding conviction of the truth of the charge and which accords with and satisfies their reason and judgment to a moral certainty. Proof less satisfactory than this is not proof beyond a reasonable doubt and is not sufficient upon which to convict of crime. This degree of proof applies to each independent fact or circumstance relied upon to show guilt; that is, each essential fact or circumstance in a chain of facts or circumstances necessary to establish guilt must be sustained to the same degree of certainty, since a chain is truly said to be no stronger than its weakest link. And where the jury is left with a reasonable doubt as to the truth of any one such essential fact, a defendant is entitled to the benefit of such doubt by an acquittal. And where circumstantial evidence is relied upon, in whole or in part, for a conviction, it is not enough that the circumstances proved are merely consistent with and point to the commission of the offense charged; such circumstances must not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary nature of things and the defendant be innocent.

By what has been said, however, upon the degree of proof [216—130] required, you will not under-

stand that the Government is called upon to make a case free from any possible doubt, for such proof is rarely obtainable in dealing with human transactions; and therefore a mere fanciful doubt or feeling of hesitation should not deter you if you are satisfied that such doubt or hesitation is not sustained by your sound and sober reason after a conscientious consideration and comparison of all the evidence in the case.

The theory of the defense interposed by these defendants, as indicated by their evidence and the declarations of their counsel in argument, is, that if a conspiracy such as alleged has been shown, to which they were parties, such conspiracy was inspired and brought about through the inducement and instigation of the Government agents, and would not have been entered upon by defendants but for such instigation, nor attempted to be carried out but for the aid given by such agents—in other words, that the Government agents laid a trap for defendants and procured them to commit a crime for the very purpose of prosecuting and convicting them thereof.

But I am constrained to charge you, gentlemen of the jury, that, under the law, this theory, even if you find it sustained by the evidence, cannot be availed of by the defendants in this case as the basis of a valid defense. In other words, were you to find the facts to be fully as testified to by the defendants who took the stand, these facts would constitute no legal or valid defense in law to the charge embraced in this indictment.

In the first place, none of the Government agents

or officers whose conduct is involved in this case had the right or power to authorize the commission of the offense charged, which is an offense against the United States, and their consent to its commission, if given, or their participation therein, if you [217—131] find they did so participate, is no protection whatsoever, under the law, to the defendants or any of them, against conviction therefor, should you find that they committed the acts charged in the indictment.

Neither did said officers have the power or authority to protect defendants or any other person, if guilty of violations of the law, from arrest therefor, and a promise to that end, if given, is of no avail for defendants' protection against the consequences of their acts as you may find them. In other words, persons engaged in a criminal conspiracy such as here charged may be held guilty of the crime even though they were acting in the belief that Government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest and to aid in carrying out the object of the conspiracy.

Defendants were charged with a knowledge of these things, under the law, and, whether or not they knew them in fact, cannot be heard to invoke their ignorance as a protection against their criminal act, if you find such was committed by them.

If, therefore, you find from the evidence beyond a reasonable doubt that defendants committed the acts charged in the indictment, it will be your duty

to find them guilty, notwithstanding the participation in such acts of the officers of the Government, if you find there was such participation.

It is the duty of officers of the Immigration Service to prevent, if possible, any and all violations of the immigration laws, and to seek out and arrest all persons who violate or are attempting to violate those laws; and in the pursuit of those duties it is at times deemed necessary and proper, and the law recognizes the right of officers, if acting honestly and in the [218—132] discharge of their duty to the Government, to resort to artifice in order to detect and apprehend persons engaged in such violations.

If, therefore, you find in this case that the officers here involved were acting in good faith with the Government in the discharge of their duty, and were engaged in negotiations with the defendants, or any of them, in the transaction involved, with the sole purpose of detecting crime and with the honest purpose of performing their duty as such officers, and that they had no actual purpose or intent of wrongfully aiding or participating in the commission of the offense charged, then they are in no legal sense accomplices or co-conspirators in the commission of said offense, should you find that the same was committed, and their evidence is not to be regarded or treated by you as the evidence of accomplices.

Evidence has been introduced before you tending to show that two of the defendants, Wong Chung and Wong Wing Sai, made certain promises of reward to the witnesses Wong Ging Wee, Wong Ging Foon, Wong Sum, and Wong Dom Him, after their

arrest, coupled with certain threats or representations calculated and intended to induce them to testify falsely in this case in certain respects. Should you find this evidence to be true, you may take the facts so testified to into consideration in determining the guilt or innocence of these two defendants as tending to show a consciousness of guilt on their part, and a desire to suppress the facts and prevent the development and exposure of the truth.

There was likewise evidence introduced tending to show that the defendant Wong Yee upon his arrest for the offense charged, offered the arresting officer, John Birmingham, a sum of money to release him and permit him to go at large. Should [219—133] you find this evidence to be true, the fact so established may be taken into account by you against said defendant in determining his guilt or innocence, as tending to show a consciousness of guilt and a desire to escape punishment therefor.

Evidence as to the good character of certain of the defendants in the community in which they live as to the trait involved in the charge has been introduced before you. Such evidence is proper in support of the presumption of innocence which surrounds the defendants, and is a circumstance tending to show innocence, since the law presumes that a man of good character will not as readily enter upon or engage in a criminal enterprise as one who has a previous bad character. You should therefore give to this evidence due consideration with the other evidence in the case in determining the guilt or innocence of the defendants to whom it applies; but you

will understand that notwithstanding it may appear that the defendants have up to the time of this charge borne a good reputation in the community where they live, that fact should not deter you from finding a verdict adversely to them under this indictment if you find from the evidence as a whole that their guilt has nevertheless been established to your satisfaction beyond a reasonable doubt.

The jury may in their wisdom convict any or all of the defendants embraced within the indictment and on trial before them, as the evidence may warrant, or acquit all or any of them. It is not required, in other words, because the indictment embraces a charge against a considerable number of persons, that the Government is necessarily called upon to prove a case of guilt against each and all of the defendants. If the evidence warrant you in your wisdom in saying that certain of the defendants are guilty, but you are unable to so find with reference [220—134] to other defendants, then your duty is simply to find a verdict of guilty against those as to whose guilt you are satisfied, and acquit those as to whom you have a reasonable doubt.

The fact that all the defendants named in the indictment are not here present before you for trial is a fact with which you have no concern whatsoever. The reasons why that situation of the case has been brought about are reasons which in no wise affect the rights of the present defendants upon trial and cannot affect their right under the law in any wise, and therefore it is something with which you should not concern your minds.

I think, gentlemen of the jury, that those are all the specific principles that I care to call to your attention. There are certain general considerations, however, applying to every case of this nature, which it is my duty to call to your attention. As I have stated to you, it is the duty of the Court to charge the jury as to the law, and it is their duty to accept the law from the Court. But it is equally the duty of the jury, and the sole duty of the jury, to pass upon the facts in the case. With that function the Court has nothing whatsoever to do other than an endeavor to see that only proper evidence is permitted to go before the jury. When it has performed that function, and the evidence has been submitted to the jury, then their function, and their function alone, is to pass upon that evidence and say what the facts in the case are. And it is neither the province nor the disposition of the Court to in any manner interfere with that duty of the jury. If you have during the progress of this trial gathered any impression whatsoever from anything that I may have uttered in passing upon an objection, asking a question from a witness, or suggesting anything to counsel, as to anything that I have said in this case, you are [221—135] to entirely disregard any such impression as you may have received from such source, unless you find that it accords with your own judgment, based upon the consideration of all the evidence in the case, because it is certainly not the purpose nor the desire of the Court to ever interfere with or sway in the slightest, or affect the consideration of the jury in what would be an improper way, by giving them

its views as to what their duty is. It is perfectly proper, as was suggested to you by one of the defendant's counsel in argument, for the Judge of a federal court to suggest to the jury his views of the evidence if he sees fit. Ordinarily I do not do so. My observation of juries in federal courts is that they are of a degree of intelligence which does not call for the exercise of that privilege by the judge. The jury has had not only throughout the progress of the trial the benefit of the observations of counsel and the Court as the evidence was placed before them, but, moreover, they have had before the cause came to be submitted to them, the benefit of the eloquence and well-considered arguments by counsel, elucidating the deductions from their point of view that are to be drawn from the evidence and thereby directing your minds in an intelligent way to the facts as they conceive them, and enabling you thereby to have a better idea as to the deductions that should be drawn from the evidence than you would have without that aid. Of course, in that connection, gentlemen of the jury, after all, the onus and responsibility of finding the facts in the case rests entirely upon your shoulders, and while you are entitled to any aid that counsel can afford you, you are to use your own judgment in drawing the proper deductions and making the proper findings from the evidence, and if counsel in their zeal have made suggestions as to their view of the evidence, [222—136] or inadvertently made statements of the evidence, you, when you come to consider this case, will draw the deductions for yourself and say for yourself what

the evidence was upon a given point, and therefrom reach your own conclusions, unswayed by any considerations excepting that which will result from a fair and impartial consideration of the evidence in the case.

In that connection, gentlemen of the jury, you are also the judges of the credibility of the witnesses. It is hardly necessary for me to say much to you as to the rule or method of determining the credibility of witnesses. We do very much in courts as we determine the truth or falsehood of a statement made to us by one of our fellow-men upon the street. The manner of the witness is observed upon the stand, the testimony he has given is tested by the rules of reason and common sense, and you determine the degree of credibility that you are to accord to that witness very much in the same manner as you would determine, as I say, whether a friend or an enemy, as the case might be, was making a statement of fact to you. You see how far the evidence of a witness accords with the other facts as proven in the case, how far it is consistent with those facts, and to what extent, if any, it is improbable in itself, inherently improbable. Of course, a witness comes upon the stand surrounded by the presumption that he is telling the truth, and it is the duty of the jury to accord him the benefit of that presumption unless that presumption is overcome by the manner in which he testifies, the facts that he testifies to, or other circumstances in the case which disclose to the jury that they cannot rely upon his statements. The fact that a witness appears to the jury to have been merely

mistaken as to a part of his evidence does not necessarily discredit him in other respects. It might make you more careful, perhaps, in [223—137] the consideration of the rest of his evidence. But if a witness comes upon the stand and tells what you believe to be a deliberate falsehood, then you have a right, in your wisdom, to discredit all his testimony, unless the other evidence in the case is such as to satisfy you that in other respects he has told the truth. This applies to all the witnesses alike.

Certain defendants have taken the witness-stand in this case and given their version of the facts. Now, the defendants are entitled as witnesses to the same kind of consideration as any other witnesses. They are not to be discredited upon the ground that they are defendants. You are to accord to them the same fair and impartial consideration of their evidence in the light of all the other facts in the case as you would the testimony of a witness without the slightest interest in the case. But in connection with the evidence of the defendants, you have a right to, precisely as you have a right with reference to any other witness, consider the interest they have in the results of the trial, to determine how far that interest may have tended to color his evidence in his own interest, or otherwise. You will understand from this that there is no presumption against the truth of the evidence that a defendant may give upon the witness-stand any more than that of any other witness that comes into the case, but you are entitled to consider the interest he has in the result of the trial in coming to a

verdict, and to what extent that may affect his testimony before you.

Gentlemen of the jury, the fact that an indictment is found against a man is no evidence of guilt whatsoever. It gives rise to no presumption of guilt. A defendant charged with a criminal offense is presumed under the law to be innocent until his guilt is proved by evidence which satisfies the minds of the jury, as [224—138]. I have indicated to you, beyond what is termed a reasonable doubt, and which I have undertaken to define to you. You will bear that in mind in passing upon the rights of these defendants, as between them and the Government.

[Exceptions to Certain Instructions Given and Refused.]

Mr. CAMPBELL.—May it be understood that the instructions which were argued, and which you refused to give on behalf of the defendant, and those which you gave this morning, may be under an exception.

The COURT.—You may take that exception now. The fact is that the Supreme Court has recently suggested that those exceptions should be taken before the jury retires—you must specify in a general way your exceptions, and that is suggested for the reason that the court is to be given an opportunity to correct it.

Mr. CAMPBELL.—I only refer to those which we have talked about, which your Honor has decided both against the prosecution and against us—those particular ones I do not deem it necessary to specify, because your Honor has been apprised of both of

them. That in relation to the entrapment, and so forth, of the defendants.

The COURT.—You except to the charge as given by the Court on that question?

Mr. CAMPBELL.—Yes.

Mr. DENIS.—And the refusal to give those instructions.

The COURT.—Yes.

The above instructions constitute all the instructions given by the Court to the jury.

The following are the instructions requested by the defendants, and which the Court refused to give to the jury: [225—139]

**[Instructions Requested by Defendants and
Refused.]**

Under proper circumstances a Government officer may, and it is frequently his duty to, engage in the detection of crime, but no one may or should procure the commission of crime for the purpose of arresting anyone. No one should lend aid or encouragement to the commission of crime, and no Court should, even to aid in detecting a supposed offender, lend its countenance to violation of positive law or to contrivances for inducing a person to commit a crime; therefore, if you find from the evidence that the plan to entrap the defendants into the commission of the overt act charged in the indictment was devised, instigated or suggested to the defendants, or any of them, by Government officers, or that the defendants, or any of them, were induced or solicited by Government officers to commit the overt act charged in the indictment, your verdict should be not guilty.

If you find from the evidence presented to you in this case that officers of the United States Government, or an agent, or agents of or persons acting under the employment of such Government officers, advised, instigated, suggested, induced or procured the defendants to conspire and confederate together for the purpose of violating the Chinese exclusion laws of the United States, you should find the defendants not guilty.

If you find from the evidence that the defendants brought, or caused to be brought into the United States the Chinese persons named in the indictment, in violation of the Chinese exclusion laws of the United States, and in pursuance of the conspiracy alleged in the indictment, if you find that such a conspiracy was entered into or existed, yet if you believe from the evidence that the defendants brought, or caused to be brought into the United States the Chinese persons named in said indictment by reason of, or because of the instigation, suggestion, plan, inducement [226—140] or procurement of officers or employees of the United States Government, your verdict should be not guilty.

[Stipulation Re Settlement of Bill of Exceptions.]

It is hereby stipulated that the foregoing may constitute the Bill of Exceptions of the above-entitled

cause and that the same may be settled by the Judge who tried the same.

ALBERT SCHOONOVER,
U. S. Attorney,
HARRY R. ARCHBALD,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
DENIS & LOEWENTHAL,
C. H. SOOY,
Attorneys for Defendants.

[Order Settling Bill of Exceptions.]

The foregoing bill of exceptions is hereby settled as engrossed above.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 303—Criminal. In the District Court of the United States, Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Engrossed Bill of Exceptions on Behalf of Defendants Woo Wai, Wong Chung and Wong Yee. Filed May 29, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. J. C. Campbell, 659 Mills Bldg., San Francisco, Cal., Attys. for Defts. Above Named. **[227]**

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

Assignment of Errors.

Woo Wai, Wong Chung and Wong Yee, defendants in the above-entitled cause, and plaintiffs in error herein, having petitioned for an order from said Court permitting them to procure a Writ of Error from this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and entered in said cause, against said plaintiffs in error, and petitioners herein, now make and file with their said petition the following assignments of error herein upon which they will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every of them, are to the great detriment, injury and prejudice of the said defendants, and in violation of the rights conferred upon them by law; and they say that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the Southern District of California, Southern Division, there is

manifest error in this, to wit:

1. The Court erred in overruling the objection of defendants to the introduction of any evidence under the indictment, said objection having been made upon the ground that said indictment failed to state an offense under Section 5440 of the Revised Statutes of the United States, or under the Penal Code, or any offense whatever, particularly [228] the offense of conspiracy, and more particularly on the ground that it failed to allege the doing of any overt act in furtherance of the conspiracy sought to be alleged, or of any conspiracy.

2. The Court erred in overruling the objection of the defendants to the question put to the witness K. C. Lanier: "State your full name," and the Court further erred in permitting any examination of said witness, and in permitting the introduction of any evidence concerning acts or declarations of the defendants, or of any of the conspirators or of their accomplices or assistants, done or made after the entry of the Chinese laborers in the United States. [229]

3. The Court erred in charging the jury as follows:

The theory of the defense interposed by these defendants as indicated by their evidence and the declaration of their counsel in argument, is, that if a conspiracy such as alleged has been shown, to which they were parties, such conspiracy was inspired and brought through the inducement and instigation of the Government agents, and would not have been entered upon by defendants but for such instigation,

nor attempted to be carried out but for the aid given by such agents—in other words, that the Government agents laid a trap for defendants and procured them to commit a crime for the very purpose of prosecuting and convicting them thereof.

4. But I am constrained to charge you, gentlemen of the jury, that, under the law, this theory, even if you find it sustained by the evidence, cannot be availed of by the defendants in this case as the basis of a valid defense. In other words, were you to find the facts to be fully as testified to by the defendants who took this stand, these facts would constitute no legal or valid defense in law to the charge embraced in this indictment.

5. In the first place, none of the Government agents or officers whose conduct is involved in this case had the right or power to authorize the commission of the offense charged, which is an offense against the United States, and their consent to its commission, if given, or their participation therein, if you find they did so participate, is no protection whatever, under the law, to the defendants or any of them, against conviction therefor, should you find that they committed the acts charged in the indictment.

6. Neither did said officers have the power or authority to protect defendants or any other person, if guilty of violations of the law, from arrest therefor, and a promise to that [230] end if given is of no avail for defendants' protection against the consequences of their acts as you may find them. In other words, persons engaged in a criminal con-

spiracy such as here charged may be held guilty of the crime even though they were acting in the belief that Government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest and to aid in carrying out the object of the conspiracy.

7. Defendants were charged with a knowledge of these things, under the law, and, whether or not they knew them in fact, cannot be heard to invoke their ignorance as a protection against their criminal act, if you find such was committed by them.

8. If, therefore, you find from the evidence beyond a reasonable doubt that defendants committed the acts charged in the indictment, it will be your duty to find them guilty, notwithstanding the participations in such acts of the officers of the Government, if you find there was such participation.

9. The Court erred in refusing to give the following instruction requested by the defendants:

Under proper circumstances a Government officer may, and it is frequently his duty to, engage in the detection of crime, but no one may or should procure the commission of crime for the purpose of arresting anyone. No one should lend aid or encouragement to the commission of crime, and no Court should, even to aid in detecting a supposed offender, lend its countenance to violation of positive law or to contrivances for inducing a person to commit a crime; therefore, if you find from the evidence that the plan to entrap the defendants into the commission of the overt act charged in the indictment was devised, instigated or

suggested to the defendants, or any of them, by Government officers, or that the defendants, or any of them, were induced or solicited by Government officers to commit the overt act charged in the indictment, your [231] verdict should be not guilty.

10. The Court erred in refusing to give the following instruction requested by the defendants:

If you find from the evidence presented to you in this case that officers of the United States Government, or an agent, or agents of or persons acting under the employment of such Government officers, advised, instigated, suggested, induced or procured the defendants to conspire and confederate together for the purpose of violating the Chinese exclusion laws of the United States, you should find the defendants not guilty.

11. The Court erred in refusing to give the following instruction requested by the defendants:

If you find from the evidence that the defendants brought, or caused to be brought, into the United States the Chinese persons named in the indictment, in violation of the Chinese exclusion laws of the United States, and in pursuance of the conspiracy alleged in the indictment, if you find that such a conspiracy was entered into or existed, yet if you believe from the evidence that the defendants brought, or caused to be brought into the United States the Chinese persons named in said indictment by reason of, or because of, the instigation, suggestion, plan, inducement or procurement of officers or employees of the United States Government, your verdict should be not guilty.

12. The Court erred in overruling and denying defendants' motion in arrest of judgment.

13. The Court erred in overruling and denying defendants' motion for a new trial.

14. The Court erred in making, giving and rendering judgment against the defendants on the indictment herein, for the reason that said indictment does not state an offense against any law of the United States, and for the reason that the verdict [232] of the jury was against law, in that the evidence showed that the crime alleged to have been committed by the defendants was instigated, procured and induced by officers and employees of the United States Government, and was not planned or committed by said defendants other than through said instigation, plan and procurement of said officers of the Government.

15. The Court erred in pronouncing sentence against the defendants.

DENIS & LOEWENTHAL,
J. C. CAMPBELL,
C. H. SOOY,

Attorneys for Woo Wai, Wong Chung and Wong
Yee, Plaintiffs in Error.

United States of America,
Southern District of California,
Southern Division,—ss.

We hereby certify that the foregoing Assignments of Error are made on behalf of the petitioners for a Writ of Error herein, and are in our opinion well taken, and the same now constitute the Assignment

of Errors upon the writ prayed for.

DENIS & LOEWENTHAL,
J. C. CAMPBELL,
C. H. SOOY,

Attorneys for Plaintiffs in Error.

[Endorsed]: Original. No. 303—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Assignment of Errors. Received copy of the within Assignment of Errors this 23 day of September, 1912. A. I. McCormick, Attorney for United States. Dudley W. Robinson, Asst. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Joseph C. Campbell, C. H. Sooy and Denis & Loewenthal, 414 Wilcox Building, Corner Second and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [233]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

Petition for Writ of Error.

Your petitioners, Woo Wai, Wong Chung and

Wong Yee, defendants in the above-entitled cause, bring this their petition for a writ of error to the District Court of the United States, in and for the Southern District of California, Southern Division, and in that behalf your petitioners say:

On the 23d day of March, 1912, there was made, given, rendered and entered in the above-entitled court and cause judgments against your petitioners, wherein and whereby your petitioner Woo Wai was sentenced to pay a fine of \$5,000.00 and to be imprisoned in the United States Penitentiary at McNeil's Island for a period of 18 months; your petitioner, Wong Chung, was adjudged and sentenced to imprisonment for twelve months in the County Jail of the County of Los Angeles, and to pay a fine of \$3,000.00; your petitioner, Wong Yee, was adjudged and sentenced to imprisonment for twelve months in the County Jail of the County of Los Angeles, and to pay a fine of \$2,000.00; and your petitioners say that they are, and each of them is advised by counsel, and they and each of them avers that there was and is manifest error in the records and proceedings had in such cause, and in the making, giving, rendition and entry of such judgment and sentence, to the great injury and damage of [234] your petitioners, all of which error will be more fully made and appear by an examination of the said record, and by an examination of the bill of exceptions by your petitioners tendered and filed, and in the Assignment of Errors hereinafter set out, and to that end, thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the

Ninth Circuit, your petitioners now pray that a writ of error may be issued directed therefrom to the said District Court of the United States for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto a true copy of the Record, Bill of Exceptions, Assignments of Errors, and all proceedings had in said cause, that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected, and full and speedy justice done your petitioners.

And your petitioners now make the Assignment of Errors attached hereto upon which they will rely, and which will be made to appear by a return of said Record in obedience to said Writ.

WHEREFORE, your petitioners pray the issuance of the Writ as herein prayed, and pray that the Assignment of Errors annexed hereto may be considered as their Assignment of Errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught. And that said cause be remanded for further proceedings, and they be awarded a supersedeas upon said judgment, and all necessary process, including bail.

WOO WAI.

WONG CHUNG.

WONG YEE.

DENIS & LOEWENTHAL,

J. CAMPBELL,

C. H. SOOY,

Attorneys for Defendants. [235]

[Endorsed]: Original. No. 303—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Petition for Writ of Error. Received copy of the within Petition for Writ of Error this 23 day of September, 1912. A. I. McCormick, Attorney for United States. Dudley W. Robinson, Assistant. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Denis & Loewenthal, 414 Wilcox Building, corner Second and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [236]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

**Order Allowing Writ of Error and Supersedeas [on
Behalf of Woo Wai].**

The writ of error and supersedeas therein prayed for by the defendant, Woo Wai, pending the decision upon the writ of error are hereby allowed, and the defendant Woo Wai is admitted to bail upon the writ of error in the sum of \$15,000.

The bond for costs upon the writ of error is hereby fixed at the sum of \$250.00.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 303—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Order Allowing Writ of Error and Supersedeas of Woo Wai. Received copy of the within order this —— day of September, 1912. ————, Attorney for United States. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. J. C. Campbell, C. H. Sooy, Denis & Loewenthal, 414 Wilcox Building, corner Second and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [237]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

**Order Allowing Writ of Error and Supersedeas [on
Behalf of Wong Yee].**

The writ of error and the supersedeas therein

prayed for by the defendant Wong Yee, pending the decision upon the writ of error, are hereby allowed, and the defendant Wong Yee is admitted to bail upon the writ of error in the sum of \$7,500.

The bond for costs upon the writ of error is hereby fixed at the sum of \$250.00.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 303—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Order Allowing Writ of Error and Supersedeas of Wong Yee. Received copy of the within this — day of September, 1912. ———, Attorney for United States. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. J. C. Campbell, C. H. Sooy, Denis & Loewenthal, 414 Wilcox Building, corner Second and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [238]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI, WONG CHUNG, WONG WING SAI
and WONG YEE,

Defendants.

**Order Allowing Writ of Error and Supersedeas [on
Behalf of Wong Chung].**

The writ of error and the supersedeas therein prayed for by the defendant, Wong Chung, pending the decision upon the writ of error, are hereby allowed, and the defendant Wong Chung is admitted to bail upon the writ of error in the sum of \$10,000. The bond for costs upon the writ of error is hereby fixed at the sum of \$250.00.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 303—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Order Allowing Writ of Error and Supersedeas of Wong Chung. Received copy of the within order this — day of September, 1912. ———, Attorney for United States. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. J. C. Campbell, C. H. Sooy, Denis & Loewenthal, 414 Wilcox Building, corner Second and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [239]

Illinois Surety Company. Amount \$15,000.00 Penal.
No. S. F. 1817. \$250.00 Costs.

Supersedeas Bond [Given by Woo Wai].

KNOW ALL MEN BY THESE PRESENTS:
That we, Woo Wai, of San Francisco, California, as

principal, and the ILLINOIS SURETY COMPANY, an Illinois corporation, having its principal place of business at Chicago, Illinois, authorized under the provisions of Act of Congress approved August 13, 1894, as amended by the Act of Congress approved March 23, 1910, to become sole surety upon recognizances, stipulations, bonds or undertakings, and licensed by the State of California, as surety, are held and firmly bound to the UNITED STATES OF AMERICA in the full sum of FIFTEEN THOUSAND (\$15,000.00) DOLLARS, lawful money of the United States, and for the further sum of TWO HUNDRED FIFTY (\$250.00) DOLLARS, lawful money of the United States, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of September, 1912.

WHEREAS, lately at a term of the District Court of the United States for the Southern District of California, Southern Division, in a suit pending in the said court between the United States of America, plaintiff, and Woo Wai, defendant, a judgment and sentence was made, given, rendered and entered against the said Woo Wai, and the said Woo Wai is about to apply for a writ of error from the United States *Circuit of Appeals* for the Ninth Circuit, to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in the said United States Circuit Court of

Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at or within the time to be fixed in said citation, which said citation shall be duly issued and served within the time provided by law; [240]

NOW, THE CONDITION of the above obligation is such, that if upon the issuance of such writ and service, of such citation as aforesaid, the said Woo Wai shall appear either in person, or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day, or days, as may be appointed for the hearing of said cause in the said court, and prosecute his writ of error, and if the said Woo Wai shall abide by and obey all orders made by the United States *Circuit of Appeals* for the Ninth Circuit, in the said cause, and shall surrender himself in execution of such judgment and sentence as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such days or day as may be appointed for the retrial by said court provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be

void; otherwise to remain in full force, virtue and effect.

(Chinese Signature) WOO WAI. (Seal)

ILLINOIS SURETY COMPANY.

CHARLES T. HUGHES. (Seal)

Attorney in Fact.

C. T. HUGHES,

General Agent, 920 Metropolis Bank Bldg., San Francisco.

Signed, sealed, taken, and acknowledged before me this 16th day of September, 1912.

[Seal]

FRANCIS KRULL,

United States Commissioner, North'n Dist. of California.

[Endorsed]: No. 303—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Supersedeas Bond of Woo Wai. The within Bond is hereby approved. Dated Sept. 23, 1912. Olin Wellborn, Judge. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. J. C. Campbell, C. H. Sooy, Denis & Loewenthal, 414 Wilcox Building, corner Second and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [241]

Illinois Surety Company. Amount \$7,500: Penal.

No. S. F. 1818.

\$250: Costs.

Supersedeas Bond [Given by Wong Yee].

KNOW ALL MEN BY THESE PRESENTS:

That we, Wong Yee, of San Francisco, California, as

principal, and the ILLINOIS SURETY COMPANY, an Illinois corporation, having its principal place of business at Chicago, Illinois, authorized under the provisions of Act of Congress approved August 13, 1894, as amended by the Act of Congress approved March 23, 1910, to become sole surety on bonds, undertakings, recognizances, stipulations, etc., and licensed by the State of California, as surety, are held and firmly bound to the UNITED STATES OF AMERICA in the full sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00), lawful money of the United States, to be paid to the United States, and the further sum of TWO HUNDRED FIFTY DOLLARS (\$250.00), lawful money of the United States, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrator, successors, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of September, 1912.

WHEREAS, lately at a term of the District Court of the United States for the Southern District of California, Southern Division, in a suit pending in the said court between the United States of America, plaintiff, and Wong Yee, defendant, a judgment and sentence was given, made, rendered and entered against the said Wong Yee, and the Wong Yee is about to apply for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence and a citation directed to the United States of America to

be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at or within the time to be fixed in said citation, which said citation shall be duly issued and served, within the time provided by law;

NOW, THE CONDITION of the above obligation is such that if upon [242] the issuance of such writ and service of such citation as aforesaid, the said Wong Yee shall appear either in person, or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day, or days, as may be appointed for the hearing of said cause in the said court, and prosecute his writ of error, and if the said Wong Yee shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said cause, and shall surrender himself in execution of such judgment and sentence as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court, provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then this obliga-

tion to be void; otherwise to remain in full force, virtue and effect.

(Chinese Signature) WONG YEE. (Seal)

ILLINOIS SURETY COMPANY.

CHARLES T. HUGHES. (Seal)

Attorney in Fact.

C. T. HUGHES,

General Agent, 920 Metropolis Bank Bldg., San Francisco.

Signed, sealed, taken, and acknowledged before me this 16th day of September, 1912.

[Seal]

FRANCIS KRULL,

United States Commissioner, North'n Dist. of California.

[Endorsed]: No. 303—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Supersedeas Bond of Wong Yee. The within bond is hereby approved. Dated Sept. 23, 1912. Olin Wellborn, Judge. Filed Sep. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. J. C. Campbell, C. H. Sooy, Denis & Loewenthal, 414 Wilcox Building, corner Second and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [243]

Illinois Surety Company. Amount \$10,000: Penal.

No. S. F. 1819.

\$250: Costs.

Supersedeas Bond [Given by Wong Chung].

KNOW ALL MEN BY THESE PRESENTS:

That we, Wong Chung, of San Francisco, California, as principal, and the ILLINOIS SURETY COMPANY, an Illinois corporation, having its principal place of business at Chicago, Illinois, authorized under the provisions of Act of Congress approved August 13, 1894, as amended by the Act of Congress approved March 23, 1910, to become sole surety on bonds, undertakings, recognizances, stipulations, etc., and licensed by the State of California, as surety are held and firmly bound unto the UNITED STATES OF AMERICA in the full sum of TEN THOUSAND DOLLARS (\$10,000), lawful money of the United States to be paid to the United States, and the further sum of TWO HUNDRED FIFTY DOLLARS (\$250.00), lawful money of the United States to be paid to the United States, to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of September, 1912.

WHEREAS, lately at a term of the District Court of the United States for the Southern District of California, Southern Division, in a suit pending in the said court between the United States of America, plaintiff, and Wong Chung, defendant, a judgment and sentence was made, given, rendered and entered against the said Wong Chung, and the said Wong Chung is about to apply for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence, and

a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at or within the time to be fixed in said citation, which said citation shall be duly issued and served, within the time provided by law;

NOW, THE CONDITION of the above obligation is such that if upon the issuance of such writ and service of such citation as aforesaid, [244] the said Wong Chung shall appear either in person, or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day, or days, as may be appointed for the hearing of said cause in the said court, and prosecute his writ of error, and if the said Wong Chung shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said cause, and shall surrender himself in execution of such judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then this obligation to be void; otherwise to remain in

full force, virtue and effect.

(Chinese Signature)

WONG CHONG. (Seal)

ILLINOIS SURETY COMPANY.

CHARLES T. HUGHES. (Seal)

Attorney in Fact.

C. T. HUGHES,

General Agent, 920 Metropolis Bank Bldg., San
Francisco.

Signed, sealed, taken and acknowledged before me
this 16th day of September, 1912.

[Seal]

FRANCIS KRULL,

United States Commissioner, North'n Dist. of Cali-
fornia.

[Endorsed]: No. 303—Crim. In the District
Court of the United States, in and for the Southern
District of California, Southern Division. United
States of America, Plaintiff, vs. Woo Wai et al.,
Defendants. Supersedeas Bond of Wong Chung.
The within bond is hereby approved. Dated Sept.
23, 1912. Olin Wellborn, Judge. Filed Sep. 23,
1912. Wm. M. Van Dyke, Clerk. By C. E. Scott,
Deputy Clerk. J. C. Campbell, C. H. Sooy, Denis
& Loewenthal, 414 Wilcox Building, corner Second
and Spring Streets, Los Angeles, Cal., Attorneys for
Defendants. [245]

[Bond Given by Wong Yee.]

No. S. F. 3677.

Amount, \$3,750.00

ILLINOIS SURETY COMPANY.

Home Office: 134 So. La Salle Street,
CHICAGO.

(Cut)

ILLINOIS SURETY COMPANY.

All Kinds of Surety Bonds.

C. T. HUGHES,

General Agent,

433 California Street,

SAN FRANCISCO.

Telephone Sutter 4873.

KNOW ALL MEN BY THESE PRESENTS:
That we, Wong Yee, of San Francisco, California, as principal, and the Illinois Surety Company, an Illinois corporation, having its principal place of business at Chicago, Illinois, authorized under the provisions of Act of Congress approved August 13th, 1894, as amended by the Act of Congress approved March 23d, 1910, to become sole surety on bonds, undertakings, recognizances, stipulations, etc., and licensed by the State of California, as surety, are held and firmly bound to the UNITED STATES OF AMERICA in the full sum of THREE THOUSAND FIVE HUNDRED AND 00/100 (\$3500.00) DOLLARS, lawful money of the United States, to be paid to the United States and the further sum of TWO HUNDRED FIFTY DOLLARS (\$250.00), lawful money of the United States, to be paid to the United States, to which payment well and truly to

be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 4th day of May, A. D. 1914.

WHEREAS, lately at a term of the District Court of the United States for the Southern District of California, Southern Division, in a suit pending in the said court between the United States of America, plaintiff and Wong Yee, defendant, a judgment and sentence [246] was given, made, rendered and entered against the said Wong Yee, and the said Wong Yee having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which said citation has been duly served; and

WHEREAS, the said Wong Yee, did on the 22d day of August, 1912, file his bond or undertaking executed by himself as principal and the Illinois Surety Company, as surety in the penalty of SEVEN THOUSAND FIVE HUNDRED AND 00/100 (\$7,500.00) DOLLARS; and

WHEREAS, an order has been duly made and entered reducing the penalty of said bond to THREE THOUSAND FIVE HUNDRED AND 00/100 (\$3,500.00) DOLLARS.

NOW, THE CONDITION OF THE ABOVE

OBLIGATION IS SUCH, that if the said WONG YEE shall appear either in person, or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on said day or days, as may be appointed for the hearing of said cause in the said court, and prosecute his writ of error, and if the said Wong Yee shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said cause and shall surrender himself in execution of such judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise [247] to remain in full force, virtue and effect.

WONG YEE.

ILLINOIS SURETY COMPANY. (Seal)

By HAROLD M. PARSONS,

Its Attorney in Fact.

Taken, signed sealed and acknowledged before me this 4th day of May, A. D. 1914.

[Seal]

FRANCIS KRULL,

United States Commissioner, North'n Dist. of California.

Approved May 25, 1914.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 303—Crim. U. S. District Court, Southern District of California, Southern Division. United States of America vs. Woo Wai et. al. Bond of Defendant Wong Yee. Filed Jun. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [248]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

CLERK'S OFFICE.

No. 303—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WOO WAI et al.,

Defendants.

Praecipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please prepare the transcript on record upon writ of error in the above cause containing the following:

1. Indictment.
2. Bench warrant.
3. Arraignment and plea of defendant.
4. Record of trial, stating each day's proceedings.

5. Verdict of jury.
6. Judgment of Court.
7. Motion for new trial and in arrest of judgment.
8. Order denying same.
9. Clerk's certificate to judgment-roll.
10. Petition for writ of error on behalf of all defendants.
11. Assignments of error on behalf of all defendants.
12. Citation on writ of error.
13. Return thereto.
14. Order allowing writ of error and supersedeas.
15. Supersedeas bond of each defendant.
16. All orders extending time to file bill of exceptions. [249]
17. Bill of exceptions.
18. Clerk's certificate to transcript of record.

DENIS & LOEWENTHAL,
J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
C. H. SOOY,

For Defendants.

[Endorsed]: No. 303—Criminal. U. S. District Court, Southern District of California. United States of America, Plaintiff, vs. Woo Wai et al., Defendants. Praeceptum for Preparation of Transcript. Filed Jul. 13, 1914. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk. [250]

**[Certificate of Clerk U. S. District Court to
Transcript of Record].**

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 303—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WOO WAI et al.,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing two hundred and fifty (250) typewritten pages, numbered from 1 to 250, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Judgment-roll, Orders Extending Time to File Bill of Exceptions, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error and Supersedeas of Defendant Woo Wai, Order Allowing Writ of Error and Supersedeas of Defendant Wong Yee, Order Allowing Writ of Error and Supersedeas of Defendant Wong Chung, Supersedeas Bond of Woo Wai, Supersedeas Bond of Wong Yee, dated September 16, 1912, Supersedeas Bond of Wong Chung, Bond of Wong Yee dated June 3, 1914, and the Praecipe for Preparation of Transcript, in the above and therein entitled cause, and that the same to-

gether constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the plaintiffs in error by their attorneys of record.

I do further certify that the cost of the foregoing record is \$137.15, the amount whereof has *been to me* by [251] Woo Wai, Wong Chung and Wong Yee, the plaintiffs in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 17th day of October, in the year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in
and for the Southern District of California.

[252]

[Endorsed]: No. 2507. United States Circuit Court of Appeals for the Ninth Circuit. Woo Wai, Wong Chung and Wong Yee, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received October 26, 1914.

F. D. MONCKTON,

Clerk.

Filed October 28, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to November 1, 1914, to
File Record Thereof and Docket Cause in
Circuit Court of Appeals].

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

WOO WAI et al.,

Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same hereby is enlarged and extended to and including the 1st day of November, 1914.

Dated at Los Angeles, September 28, 1914.

OLIN WELLBORN,
United States District Judge, Southern District of
California.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Woo Wai et al., Plaintiffs in Error, vs. The United States of America,

Defendants in Error. Order Enlarging Time to
Docket Cause and File Record. Filed Sep. 30, 1914.
F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

WOO WAI, WONG YEE and WONG CHUNG,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Stipulation [for Admission of Wong Yee to Bail in
Sum of \$3500].**

It is hereby stipulated by and between Wong Yee, plaintiff in error herein, and United States of America, defendant in error herein, and their respective attorneys, that the order heretofore made by the District Court of the United States, for the Southern District of California, Southern Division, admitting said Wong Yee to bail in the sum of Seventy-five Hundred (7500) Dollars, pending the judgment of the Circuit Court of Appeals upon writ of error to said District Court in said cause, numbered 303 therein, may be vacated and set aside, and that said Wong Yee may be admitted to bail herein pending said judgment on giving good and sufficient bond in

the sum of Thirty-five Hundred (3500) Dollars.

J. C. CAMPBELL,

WEAVER, SHELTON & LEVY,

DENIS & LOEWENTHAL,

Attorneys for Wong Yee, Plaintiff in Error.

ALBERT SCHOONOVER,

United States Attorney.

HARRY R. ARCHBALD,

Assistant United States Attorney,

Attorneys for Defendant in Error.

[Endorsed]: No. 2507. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Woo Wai, Wong Yee and Wong Chung, Plaintiffs in Error, vs. United States of America, Defendant in Error. Stipulation for Admission of Wong Yee to Bail, etc. Filed May 4, 1914. F. D. Monckton, Clerk. Refiled Oct. 28, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

WOO WAI, WONG YEE and WONG CHUNG,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Admitting Wong Yee to Bail [in Sum of
\$3500].**

On motion of Mr. David L. Levy, and pursuant to the stipulation of counsel this day filed therefor, it is ORDERED that the order, heretofore made by the District Court of the United States for the Southern District of California, Southern Division, admitting the plaintiff in error Wong Yee to bail in the sum of Seventy-five Hundred (7500) Dollars pending the judgment of this Court upon the writ of error to the said District Court in the above-entitled cause, numbered 303 therein, may be vacated and set aside, and that the said plaintiff in error Wong Yee may be admitted to bail herein pending said judgment on giving good and sufficient bond in the sum of Thirty-five Hundred (3500) Dollars.

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

No. —

WOO WAI, WONG YEE and WONG CHUNG,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Stipulation [for Admission of Wong Chung to Bail
in Sum of \$3500].**

It is hereby stipulated by and between Wong Chung, plaintiff in error herein, and United States of America, defendant herein, and their respective attorneys that the order heretofore made by the District Court of the United States for the Southern District of California admitting Wong Chung to bail pending the judgment of the Circuit Court of Appeals upon writ of error to said District Court in said cause, numbered 303 therein, may be vacated and set aside, and that said Wong Chung may be admitted to bail herein pending said judgment on giving good and sufficient bond in the sum of Thirty-five Hundred Dollars (\$3500.00).

DENIS & LOEWENTHAL,

C. H. LEVY,

J. C. CAMPBELL,

WEAVER, SHELTON & LEVY,

Attorneys for Wong Chung, Plaintiff in Error.

ALBERT SCHOONOVER,

United States Attorney.

HARRY R. ARCHBALD,

Assistant United States Attorney,

Attorneys for Defendant in Error.

[Endorsed]: 2507. In the United States Circuit Court of Appeals, Ninth Circuit. Woo Wai et al., Plaintiffs in Error, vs. U. S. of America, Defendant in Error. Stipulation for Admission of Wong

Chung to Bail, etc. Filed Oct. 5, 1914. F. D.
Monckton, Clerk.

At a stated term, to wit, the October Term, A. D.
1914, of the United States Circuit Court of Ap-
peals for the Ninth Circuit held in the court-
room thereof, in the City and County of San
Francisco, in the State of California, on Mon-
day, the fifth day of October, in the year of
our Lord one thousand nine hundred and four-
teen. Present: The Honorable WILLIAM B.
GILBERT, Circuit Judge, Presiding; Honor-
able ERSKINE M. ROSS, Circuit Judge; Hon-
orable WILLIAM W. MORROW, Circuit
Judge.

No. 2507.

WOO WAI, WONG YEE and WONG CHUNG,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Admitting Wong Chung to Bail [in Sum of
\$3500].**

On motion of Mr. David L. Levy, counsel for the
plaintiffs in error, and pursuant to the stipulation
of counsel for the respective parties, this day filed
therefor, it is ORDERED that the order heretofore
made by the District Court of the United States for
the Southern District of California admitting Wong
Chung to bail pending the Judgment of this Court
upon the writ of error to the said District Court in

the above-entitled cause, numbered 303 in said District Court, be, and hereby is vacated and set aside, and that said Wong Chung be, and hereby is admitted to bail herein pending said judgment on giving good and sufficient bond in the sum of Thirty-five Hundred (3,500.00) Dollars.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. —

WOO WAI, WONG YEE and WONG CHUNG,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Stipulation [Admitting Woo Wai to Bail in Sum of \$10,000].

It is hereby stipulated by and between Woo Wai, plaintiff in error herein, and United States of America, defendant herein, and their respective attorneys that the order heretofore made by the District Court of the United States for the Southern District of California, admitting Woo Wai to bail pending the judgment of the Circuit Court of Appeals upon writ of error to said District Court in said cause, numbered 303 therein, may be vacated and set aside, and that said Woo Wai may be admitted to bail herein pending said judgment on giving good and sufficient

supersedeas bond in the sum of Ten Thousand Dollars (\$10,000.00).

DENIS & LOEWENTHAL,

C. H. LEVY,

J. C. CAMPBELL,

WEAVER, SHELTON & LEVY,

Attorneys for Woo Wai, Plaintiff in Error.

ALBERT SCHOONOVER,

United States Attorney,

HARRY R. ARCHBALD,

Assistant United States Attorney,

Attorneys for Defendant in Error.

[Endorsed]: No. 2507. United States Circuit Court of Appeals for the Ninth Circuit. United States, Plaintiff, vs. Woo Wai et al., Defendants. Stipulation for Admission of Woo Wai to Bail. Filed Oct. 5, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2507.

WOO WAI, WONG YEE and WONG CHUNG,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Admitting Woo Wai to Bail [in Sum of
\$10,000].**

On motion of Mr. David L. Levy, counsel for the plaintiffs in error, and pursuant to the stipulation of counsel for the respective parties this day filed therefor, it is ORDERED that the order heretofore made by the District Court of the United States for the Southern District of California admitting Woo Wai to bail pending the Judgment of this Court upon the writ of error to the said District Court in the above-entitled cause, numbered 303 in said District Court, be, and hereby is vacated and set aside, and that said Woo Wai be, and hereby is admitted to bail herein pending said judgment, on giving good and sufficient supersedeas bond in the sum of Ten Thousand (10,000) Dollars.

[Stipulation as to Printing Record.]

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

No. —

WOO WAI, WONG YEE and WONG CHUNG,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**STIPULATION CONCERNING RECORD ON
WRIT OF ERROR.**

It is hereby stipulated by and between the parties hereto and their respective counsel that in printing the record to be used upon writ of error herein the clerk of the above-entitled court may except therefrom the following:

1. Minutes of trial, pages 24 to 50, inclusive, of the Clerk's typewritten record;
2. Orders and stipulations extending time with reference to bill of exceptions and amendments thereto, pages 58 to 87, inclusive;
3. All orders extending time to file record in Circuit Court of Appeals except order filed September 30, 1914, which last mentioned order shall be included.

DENIS & LOEWENTHAL,
J. C. CAMPBELL,
WEAVER, SHELTON & LEVY,
C. H. LEVY,

Attorneys for Plaintiffs in Error.

ALBERT SCHOONOVER,
HARRY R. ARCHBALD,
Attorneys for Defendant in Error.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth District. No. 2507. Woo Wai et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Stipulation Concerning Record on Writ of Error. Filed Nov. 19, 1914. F. D. Monckton, Clerk.

5-

No. 2567

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WOO WAI, WONG CHUNG and WONG YEE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiffs in Error.

DENIS and LOWENTHAL,

C. H. SOOY, and

J. C. CAMPBELL, WEAVER,

SHELTON and LEVY,

Attorneys for Plaintiffs in Error.

GEO. R. ARMSTRONG, Printer

Filed

JAN 19 1915

F. D. Morrison.

TABLE OF CONTENTS.

	Page.
Story	1
Statement of facts.....	6
Specifications of error.....	13
Points and authorities.....	17

TABLE OF CASES.

B.

Bush v. State, 151 S. W. (Texas), 556, 151 S. W., 554....	24
---	----

C.

Commonwealth v. Bickings, 12 Pa. Dist. Ct., 206.....	23
Connor v. People, 18 Colo., 373, 25 L. R. A., 348.....	20

D.

Dever v. State, 37 Tex. Cr. R., 397, 30 S. W., 1071.....	24
--	----

G.

Grimm v. United States, 156 U. S. Sup. Ct., 605, 39 L. Ed., 550	19
--	----

H.

Hearne v. State, 165 S. W. (Texas), 603.....	24
--	----

L.

Love v. People, 160 Ill., 501, 32 L. R. A., 141.....	21
--	----

O.

O'Brien v. State, 6 Tex. App., 665.....	25
---	----

P.

	Page.
People v. Braisted, 13 Colo. App., 532, 58 Pac., 796.....	22
People v. Hanselman, 76 Cal., 460.....	19
People v. McCord, 76 Mich., 200, 42 N. W., 1108.....	25

S.

Scott v. State, 153 S. W., 871 (Tex.).....	23
State v. Currie, 13 N. D., 655, 69 L. R. A., 408.....	21
Steele v. State, 19 Tex., App., 425.....	24

U.

United States v. Adams, 59 Fed., 677.....	18
United States v. Healy, 202 Fed., 350.....	18
United States v. Jones, 80 Fed., 513.....	19
United States v. Phelps, 16 Philippine Rep., 443.....	17
United States v. Whittier, 28 Fed. Cases, 594, Case No. 16,688	18

W.

Wilcox v. People, 17 Colo. App., 109, 67 Pac., 343.....	22
---	----

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WOO WAI, WONG CHUNG and WONG YEE,	}
<i>Plaintiffs in Error,</i>	
vs.	
THE UNITED STATES OF AMERICA,	}
<i>Defendant in Error.</i>	

BRIEF OF PLAINTIFFS IN ERROR.

THE STORY.

At some date, not given in the record of this case, but certainly prior to October, 1908, a scheme was devised by Government officials, so high in the places of power and so distinguished in their respective exalted positions that unless these facts had been testified to by Government witnesses, the story which follows would not be believed by any man with the ordinary sense of the decencies of life.

It appears from the evidence offered by the Government that Professor Jenks, United States Commissioner of Immigration, prior to October, 1908, employed a

detective named Golden M. Roy, in the presence of Professor Sanford, a Government official and also a professor of physics at Stanford University, as a detective to act in conjunction with Sanford's investigation, which will appear later in this narrative. Under such employment, the detective Roy procured himself to be introduced to Woo Wai, a Chinaman who for more than thirty years had been a law-abiding resident and prominent merchant in the City of San Francisco, and under such introduction invited Woo Wai to go with him at his expense to San Diego, representing to Woo Wai that he, Woo Wai, had been living in San Francisco for more than thirty years and had not been out anywhere, and that he had better come down and see Los Angeles and San Diego, and that there would be a way to make money (Tr., pp. 152-3). Roy finally succeeded in getting Woo Wai to leave San Francisco and go with him to San Diego; he, Roy, paying *with Government money*, all of the expenses of the trip. Arriving at San Diego, Roy had one Conklin, a Government official, promptly on hand to meet Woo Wai, and introduced him to the latter as his friend. The same evening Roy took Woo Wai to the *United States Custom House*, where was waiting for him, one Weddle, another Government official, and he again introduced Woo Wai to this latter official as being also his friend.

There had been devised a nefarious scheme by Government officials through which the poison of crime

was attempted to be injected into the mind of Woo Wai. The plan suggested was that Woo Wai should bring Chinese from Mexico into the United States, under the ægis of the protection of Government officials.

Woo Wai, even though a Chinaman, demurred, delayed and refused to join in this damnable scheme, and it was not until nearly eighteen months later that through the insistence, the machinations and the outrageous traps of Government officials, including the authority of the Secretary of Commerce and Labor, given in a telegram to Inspector Weddle, that the integrity of Woo Wai was finally broken down, and he was induced to join in a conspiracy to violate the laws of the United States, which resulted in his indictment and conviction.

Among the government officials, actual parties to the scheme which the record in this case discloses, are:

PROFESSOR JENKS, United States Immigration Commissioner, a distinguished scholar and Professor at Cornell University;

BENJAMIN J. CABLE, Assistant Secretary of Commerce and Labor;

DANIEL J. KEEFE, Commissioner General of Immigration;

W. R. WHEELER, former Assistant Secretary of Commerce and Labor, member of the Immigration Commission;

PROFESSOR SANFORD, member of the faculty of Stan-

ford University and Confidential Agent of the Immigration Commission;

H. H. WEDDLE, Inspector in charge of the Immigration Service of the United States in the District of San Diego; and

RALPH L. CONKLIN, Chinese Inspector in the Immigration Bureau.

The only justification for the job put up on Woo Wai is to be found in the record as being the desire of these high government officials to "get something" on Woo Wai, who was supposed to have information desired by the Government as to matters in San Francisco, and by so "getting something" on him force from him the disclosure of what he was supposed to know.

A careful reading of the Government's testimony on this point will suggest to this Honorable Court that Torquemada was a tyro in extracting from his victims information supposed to be in their possession, in comparison with the acts and infamies perpetrated upon this poor but very prominent Chinaman, which were unblushingly confessed to be for the purpose of securing from him "certain information . . . and to get a hold on him (Woo Wai) to get that information" (Tr., p. 77). "We were doing that for the purpose of getting a hold on Woo Wai, to find out something that he knew" (Tr., p. 79).

Parenthetically it may be remarked here that the record shows the information sought from Woo Wai had nothing whatever to do with the smuggling of

Chinese into the United States by way of San Diego, but referred to Chinese prostitution in San Francisco. This is to be deduced from the statement of the witness Weddle, as found reported on page 78 of the Transcript, in which he states:

“Q. And Professor Sanford wanted to get information in relation to Dr. Gardner and Mr. North of the Immigration Commission in San Francisco?

“A. He didn't tell me that.

“Q. The Immigration officers there?

“A. People connected with the Immigration offices. He didn't say who. I believe he wanted a hold on Woo Wai to make Woo Wai tell him those things.”

It is not necessary to the sequence of this story but is illuminating to this Court as to the means used by the Government conspirators in this case to refer to the numberless brutalities of some of the Government perpetrators by which was finally secured the confidence of Woo Wai so as to break down his sense of right acquired during a residence of over thirty years in San Francisco. We refer, *inter alia*, to the visit of Inspector Conklin to Woo Wai's home, where about Christmas time, this Government official brought presents to the young children of Woo Wai, caressed them, and by a simulated tenderness more than anything else in this case, blinded Woo Wai to their nefarious purpose.

It would be an imposition upon your Honors to

more than merely outline, as has been done above, the plot that resulted in creating a criminal out of an honest, honorable Chinaman, and, as a necessary incident, pulling down with him the other defendants in this case, who plainly relied upon Woo Wai's leadership.

And do not forget, your Honors, that this man was made a criminal by Government officers of high rank and standing after he had withstood for a long period of months their efforts to seduce him.

STATEMENT OF THE FACTS.

In October, 1908, a detective named Golden M. Roy (neither whose testimony nor career, unfortunately for the defendants, is to be found in the record, though within the power of the great United States Government to produce and tender to the jury), procured himself to be introduced to Woo Wai, one of the most prominent merchants in San Francisco, and who had lived in that city for more than thirty years. Roy for this purpose called upon Tom King Chong, for many years theretofore the editor of a Chinese Republican newspaper, who had been the friend of Woo Wai for a period of more than twenty years, and asked him if he, Tom King Chong, would get Woo Wai to come and meet him, Roy (Tr., p. 135). It appears from the evidence of the Government witnesses that Roy was employed by Government officials for the purposes herein stated. Following the introduction the testimony shows that Roy succeeded in persuading

Woo Wai to go with him to San Diego in October, 1908.

Arriving at San Diego, Roy and Woo Wai were met by United States Inspector Conklin at a hotel selected by Roy, where Roy introduced Conklin to Woo Wai as his friend. Upon such introduction, Conklin said to Woo Wai, pointing to Roy: "This man is my friend, and then he is the man that secured my position which I am now in" (Tr., p. 140).

The three then proceeded to the United States Custom House where Roy said he would introduce Woo Wai to the head man of the office. "And after this, I will bring you to see the head man of the office" (Tr., p. 141).

Arriving there Roy introduced Woo Wai to Weddle, who was Inspector in Charge, saying: "This is my friend."

Weddle testified: "I was not a friend of his; never saw him before, and didn't know him. I did not contradict him" (Tr., p. 78).

There for the first time was developed to Woo Wai the purpose of Roy in taking him to San Diego.

The evidence shows that Woo Wai did not rise to the bait, as had been hoped. He testified: "I didn't assent to it. . . . While they were talking about this, I said: 'Well, it is very—that is very impossible, because I read the newspaper about the arrest of Chinamen for deportation in and about Los Angeles and in this neighborhood; it is very hard to

“‘do it’” (Tr., p. 140). “Then all of this was talked over by themselves. Of course, I listened to them, and then I said, ‘Well, it is not a business for me to do, because I have so much business up in San Francisco’” (Tr., p. 142).

These arch conspirators plainly saw their victim slipping from their slimy fingers, and in the endeavor to reassure Woo Wai and overcome his plainly expressed refusal, Roy said: “Oh, do—don’t so much afraid, not to afraid, because he is a Government officer; he will attend to it” (Tr., p. 141). And they said (of course meaning Weddle and Conklin): “Oh, well if we make no arrest, who can make arrest? And then we don’t want to go to jail, you don’t want to go to jail; and if you go to jail, we will go to jail” (Tr., p. 143).

And so they reasoned and labored with him, and deliberately laid before him a plan complete in all of its details for carrying out the plot which they had devised “to get a hold” on him, and as heretofore shown.

Presumably hostile inspectors were to be switched from the route over which they suggested the proposed contraband Chinese should travel. A Mexican guide should be put in charge of them, and all would have a sign, then agreed upon, which would identify them and distinguish them from other contraband, so as to permit them to pass safely into the United States (Tr., pp. 141-2). These contraband were to walk on the

railroad track as the imprint of their feet on the sandy road would permit their being traced (Tr., p. 145).

Woo Wai persisted in his refusal, notwithstanding all of the blandishments of the detectives and the Government inspectors, and returned to San Francisco (Tr., p. 145).

Subsequently, however, the Government inspectors unfolded further details. Maps were produced and the route to be traveled indicated thereon, and information concerning different towns and railroad connections was given by the inspectors (Tr., pp. 125, 148, 168).

The letter of Professor Sanford plainly indicates the truth of Woo Wai's statement that he had declined to go into the scheme. Note the language of his letter to Conklin, Government's Exhibit 27, found on page 67 of the Transcript, under date December 2, 1908:

"Dear Conklin: I have seen our friend since his return, and I think we will make matters all right yet. If some one else comes down there, tell Weddle to let them through anyway. I suppose he has received the telegram from Sec. Strauss concerning Woo Wai. The Secretary wired me that he would instruct him to let him pass. I will stand the responsibility of your letting another man through if necessary. Use him yourself for all he is worth . . ."

What else could be meant by the learned professor of a great University when he says: "I think we will

make matters all right yet," than that he still hoped to instigate and induce Woo Wai to become a criminal. This letter, produced by the Government, written by a Government official, as well as the testimony of Weddle on page 81 of transcript, is our justification for connecting the name of a Cabinet Minister with the plot referred to by us in what we have designated as "THE STORY."

These Government officials continued to hound Woo Wai. Prior to July or August, of 1909, Roy used his best endeavors to get Woo Wai to go down again, and take with him Wong Yee or Wong Chung, for the purpose of smuggling Chinese (Tr., p. 147). Woo Wai further testifies: "After July or August, " 1909, I didn't see Roy any more, I got letters from " this man, Mr. Conklin several times—wanted me to " go down. I think it was the last part of February " or March, 1910." These letters, however, were burned by Woo Wai under instructions of Conklin and Weddle that "the letters must be burned; they always burn mine, and I would burn theirs" (Tr., p. 147).

It was March 31, 1910, seventeen months after the first meeting in the San Diego Custom House, before anybody had succeeded in stirring up Woo Wai to the criminal activities long attempted by Government officials, at which time he wrote the letter which is found on page 65 of the Transcript and is Government's Exhibit No. 5. In that connection Woo Wai testified: "This letter dated March 31, 1910, begining 'Mr.

"Conklin My dear Friend,' was written by me after "I received the letter from Mr. Conklin in February "or March, 1910" (Tr., p. 148). But even then, and for several months thereafter, Woo Wai's delays had been unsatisfactory to the Government officials. Read United States Inspector Conklin's letter to Woo Wai dated January 2, 1911, commencing, "What's the matter you?"

U. S. Exhibit I, Tr., p. 87.

It must be apparent to your Honors from the above that every artifice and deception that human wit could devise were adroitly employed by the Government officials in this case to secure the confidence of the defendants, to overcome their opposition, and to induce them to commit crime.

Upon the stand these Government inspectors, Weddle and Conklin, were compelled to admit their duplicity:

Weddle testified:

"Q. You disliked, did you not, to tell the falsehoods and to make him believe you were standing in with him when you were not?

"A. Yes sir, I didn't like it" (Tr., p. 91).

Conklin testified:

"Q. And every word that you told him was absolutely and unqualifiedly false, was it not?

"A. Yes sir.

"Q. What did you do that for?

"A. I wanted to get evidence. I knew if I told

him that I wanted to get evidence, I wouldn't get it.

"Q. Were you willing to tell a falsehood to get evidence, even against a Chinaman?

"A. I did" (Tr., p. 130).

Also:

"Q. What were you willing to do to procure it (evidence)?

"A. I was willing to do most anything I could in order to gain the evidence necessary, without committing any crime" (Tr., p. 131).

Probably no useful purpose can be subserved by further reviewing in detail the evidence showing the entrapment of these defendants by the cabal of Government officials heretofore referred to. This can more satisfactorily be done, we take it, in the oral argument, with the implicit confidence which we have that your Honors will carefully read all of the testimony in this very important case.

And notwithstanding the rule of this court requiring a concise abstract or statement of the case, we deem it unnecessary to go more fully into the items of evidence than we have done above for the reason that our defense is that Woo Wai and his co-defendants were entrapped, instigated and induced to commit the crime, of which they were convicted, by Government officials, and this is disclosed by evidence amounting to demonstration.

SPECIFICATIONS OF ERRORS.

The Honorable the trial Judge, was of course fully advised of the defense relied upon at the trial, and the following instructions based upon that defense were requested of him by the defendants:

“Under proper circumstances a Government officer may, and it is frequently his duty to, engage in the detection of crime, but no one may or should procure the commission of crime for the purpose of arresting anyone. No one should lend aid or encouragement to the commission of crime, and no Court should, even to aid in detecting a supposed offender, lend its countenance to violation of positive law or to contrivances for inducing a person to commit a crime; therefore, if you find from the evidence that the plan to entrap the defendants into the commission of the overt act charged in the indictment was devised, instigated or suggested to the defendants, or any of them, by Government officers, or that the defendants, or any of them, were induced or solicited by Government officers to commit the overt act charged in the indictment, your verdict should be not guilty.”

“If you find from the evidence presented to you in this case that officers of the United States Government, or an agent, or agents of or persons acting under the employment of such Government officers, advised, instigated, suggested, induced or procured the defendants to conspire and confederate together for the purpose of violating the Chinese exclusion laws of the United States, you should find the defendants not guilty.”

“If you find from the evidence that the defendants brought, or caused to be brought into the

United States the Chinese persons named in the indictment, in violation of the Chinese exclusion laws of the United States, and in pursuance of the conspiracy alleged in the indictment, if you find that such a conspiracy was entered into or existed, yet if you believe from the evidence that the defendants brought, or caused to be brought into the United States the Chinese persons named in said indictment by reason of, or because of the instigation, suggestion, plan, inducement or procurement of officers or employees of the United States Government, your verdict should be not guilty" (Tr., pp. 188-9; 194-5).

The above instructions were refused; upon which refusal error has been duly assigned. They contain the law of entrapment as a defense and were taken from approved cases cited by his Honor in the court below, and will be found collated, with others, in the Points and Authorities which follow.

Error is also assigned in the giving by the Court of the following instructions:

"The theory of the defense interposed by these defendants as indicated by their evidence and the declaration of their counsel in argument, is, that if a conspiracy such as alleged has been shown, to which they were parties, such conspiracy was inspired and brought about through the inducement and instigation of the Government agents, and would not have been entered upon by defendants but for such instigation, nor attempted to be carried out but for the aid given by such agents—in other words, that the Government agents laid a trap for defendants and procured them to commit a crime

for the very purpose of prosecuting and convicting them thereof.

"But I am constrained to charge you, gentlemen of the jury, that, under the law, this theory, even if you find it sustained by the evidence, cannot be availed of by the defendants in this case as the basis of a valid defense. In other words, were you to find the facts to be fully as testified to by the defendants who took this stand, these facts would constitute no legal or valid defense in law to the charge embraced in this indictment.

"In the first place, none of the Government agents or officers, whose conduct is involved in this case, had the right or power to authorize the commission of the offense charged, which is an offense against the United States, and their consent to its commission, if given, or their participation therein, if you find they did so participate, is no protection whatever, under the law, to the defendants or any of them, against conviction therefor, should you find that they committed the acts charged in the indictment.

"Neither did said officers have the power or authority to protect defendants or any other person, if guilty of violations of the law, from arrest therefor, and a promise to that end if given is of no avail for defendants' protection against the consequences of their acts as you may find them. In other words, persons engaged in a criminal conspiracy such as here charged may be held guilty of the crime even though they were acting in the belief that Government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest and to aid in carrying out the object of the conspiracy.

"Defendants were charged with a knowledge of these things, under the law, and, whether or not they knew them in fact, cannot be heard to invoke

their ignorance as a protection against their criminal act, if you find such was committed by them.

"If, therefore, you find from the evidence beyond a reasonable doubt that defendants committed the acts charged in the indictment, it will be your duty to find them guilty, notwithstanding the participations in such acts of the officers of the Government, if you find there was such participation" (Tr., pp. 192-3-4).

Manifestly, if this Court does not mean to recognize the great question of public policy presented by this appeal, to wit: that officials may not procure, induce, instigate crime, the judgment in this case must be affirmed. But we cannot believe that with the undisputed evidence furnished by the Government itself of the entrapment of these defendants through such exalted sources that this verdict, based solely upon the instructions on the subject given by the trial Court, will be allowed to stand. The jury was not permitted to consider the question whether or not the defendants were made criminals by the acts of Government officials and therefore should be acquitted.

We venture the assertion that had the jury in this case been permitted to render an untrammelled verdict the defendants would have been acquitted from the box. But they were told in insidious but legal language that they would violate their oaths if they did not render a verdict based upon the law as given by the Court, and the Court told them that the defendants were guilty.

POINTS AND AUTHORITIES.

"According to the statements made by the witness Smith, he not only suggested the commission of this crime, but he (Smith) also stated that he desired to commit the same offense and would pay his part of the expense necessary for the commission of the prohibited act. Such conduct on the part of a man who is employed by the Government for the purpose of taking such steps as are necessary to prevent the commission of the offense and which would tend to the elevation and improvement of the defendant, as a would-be criminal, rather than further his debasement, should be rebuked rather than encouraged by the courts . . . When an employee of the Government, as in this case, and according to his own testimony, encourages or induces persons to commit a crime in order to prosecute them, such conduct is most reprehensible."

United States v. Phelps, 16 Philippine Reports, at page 443.

"Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the Government's instrument to that end ignorance of fact stamps the act as involuntary, and excuses, or at least estops the Government from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the Government's invitation, which is of the nature of

fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the Government, and his is a blameless wrong for which he cannot be justly convicted."

United States v. Healy, 202 Fed., 350.

"It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal), are most rigidly scrutinized by the courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should courts not be even more strict?"

"No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime."

U. S. v. Whittier, 28 Fed. Cases, p. 594, Case No. 16,688.

"The government agent was therefore not engaged in detecting crime, but in procuring its commission."

"These facts tend to show that the accused was reluctant to act in the particular transaction, and the fact adds to the reprehensible character of the conduct of the prosecuting witness. There is no case which goes so far as to allow a conviction upon such a state of facts."

United States v. Adams, 59 Fed., at page 677.

"There is something repugnant in the idea of the government, by art and contrivance, entrapping one of its citizens into the commission of

crime in order to subject him to criminal prosecution; and such prosecutions have been felt by the courts to be more or less objectionable in morals and in policy. . . . But to go further, and after the citizen has been seduced by the government into robbing the mail, to prosecute him criminally for the act, is more or less offensive to public sentiment."

U. S. v. Jones, 80 Fed., 513, 514.

In the case of *Grimm v. United States*, 156 U. S. Sup. Ct., 605, 39 L. Ed., 550, the United States Supreme Court, while justifying the use of decoy letters, expressly says:

"It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business.

"From the authorities and upon principle we are of opinion that the conduct of the witness Slanker, as detailed by him in his testimony, did not amount to consent in law, and affords no reason why the act of appellant in taking the money (if he did take it in the manner as sworn to by Slanker) was not larceny. *If there had been a preconcert of action between Slanker and appellant, a different question would have been presented.*" (Italics ours.)

People v. Hanselman, 76 Cal., 460.

"Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals, but they have not yet gone so far,

and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification, for the course adopted and pursued in this case. . . . The encouragement of criminals to induce them to commit crimes, in order to get up a prosecution against them, is scandalous and reprehensible.

"When, in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime, and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal and ought to be rebuked, rather than encouraged, by the courts."

Connor v. People, 18 Colo., 373, 25 L. R. A.,
at page 348.

"Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity, so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold that where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the

act, by one acting in concert with such owner, that no crime is thus committed."

Love v. People, 160 Ill., 501, 32 L. R. A., at page 141.

"Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense."

State v. Currie, 13 N. D., 655, 69 L. R. A., at page 408.

"It (the County Court) simply held that the town could not recover a penalty for a violation of its ordinance, instigated and procured by its officer. It is entirely clear that the liquor, if it was purchased at all, was not purchased for the private use of any person. It was purchased to involve the seller in a violation of the ordinance, in order that the town attorney might be enabled to pursue him for a penalty. It was peculiarly the duty of Mr. Fairlamb (the town attorney), in view of the office which he filled, to uphold the ordinances of the town, and to discountenance their violation. But in this case we find him actively engaged in procuring the violation of an ordinance, even expending his own money for the purpose. So far as we can see, his only motive was to compel the victim to pay his money into the town treasury. It would be contrary to good morals to allow the plan to succeed. Public policy will not permit a municipality to derive profit from unlawful acts which are deliberately instigated and contrived by its officers. . . . To sustain this prosecution would be in effect to say that such officers have a license to inveigle citizens

into the commission of offenses, to the end that money may be extorted from them."

People v. Braisted, 13 Colo. App., 532, 58 Pacific Rep., 796.

"It appears that the city was instrumental in procuring the sale of the liquor. Its purpose was to lay the foundation for a suit. . . . The city is in no position to say that its ordinance was violated. It was as much responsible for the sale of the liquor as the defendant, and it will not be permitted to replenish its treasury from penalties incurred at its instigation. It cannot be heard to complain of an act the doing of which it solicited."

Wilcox v. People, 17 Colo. App., 109, 67 Pac. Rep., 343.

"The liability of men to fall into crime by consulting their interests and passions is unfortunately great, without the stimulus of encouragement. No State, therefore, can safely adopt a policy by which crime is to be artificially propagated. This principle it is which leads to the limitations of the doctrine as laid down by Wharton . . . namely, that the defendant who is trapped must himself have previously intended the offense into which he is trapped, and, also, that the offense intended is one to be committed by himself, either alone or with others. In the case before us, the design of the offense appears to have originated with Omen-setter, and to have been by him transferred into the defendant's mind. . . . This is virtually the case of a detective, who, by promising to perpetrate a crime, lures an innocent man into aiding and abetting it, the object being, not the perpetration of the crime, but the luring of the abettor. Such a

proceeding is not a reality, but merely a tragical farce, in which the detective, masquerading as a criminal, captivates the unsophisticated defendant, and then, with mock heroics, denounces him."

Commonwealth v. Bickings, 12 Pa. Dist. Ct., 206.

"The writer has had occasion to criticize the character and manner of inducing men to commit crime as is evidenced by this record. This witness testifies, and is not controverted or contradicted, that the sheriff agreed to give him \$10.00 for each case he would 'turn in' and additional money or compensation if a conviction should occur. The officers are not justified in inducing men to commit crime or in employing others to induce them to commit crime in order that prosecutions may be instituted. It is his duty as an officer, where he understands that parties are engaged in crime, to use every effort legitimate and permissible by law to detect and ferret out crimes and bring criminals to trial and justice. But this does not justify him in employing parties to go out and induce the citizen to commit crime that prosecutions may be instituted and carried on. We here call the attention of the legislature to such matter and would suggest that appropriate legislation be enacted to prevent matters of this sort occurring. This matter was thoroughly gone over by Judge Hurt in *Dever v. State*, 37 Tex. Cr. R., 397, 30 S. W., 1071. See also the case of *Bush v. State*, 151 S. W., 554, decided at the present term of this court." Judgment reversed.

Scott v. State, 153 S. W., 871 (Tex., Jan. 29, 1913).

"There is another line of cases which holds that where the parties originate the crime or is instrumental in its initiation and brings it about, he then becomes a *particeps criminis*, and when testifying as a witness in the case is an accomplice. The leading cases in this State are *Dever v. State*, 37 Tex. Cr. R., 396, 30 S. W., 1071; *Steele v. State*, 19 Tex. App., 425. The opinion was by Judge Hurt and draws the distinction above mentioned between parties who were playing the role of detective for the arrest and punishment of parties, and those who originate the crime or assist in originating it in the first instance."

Bush v. State, 151 S. W., 556 (Texas).

"Where an officer, understanding that a crime is to be consummated, or is in course of being brought about and carried out, and he falls in line as a detective, he would not be a principal or an accessory, or a guilty participant, because the crime had already been put into operation in part or in whole; but where he is in the inception of the crime, and helps to bring that crime about, and assists in it in order that he may arrest, as he says, the parties, he is a guilty participant, and his official character is no protection against the act. That rule is thoroughly well settled. No officer has a right to violate the law on the theory that he claims he is doing it for ultimate good. An officer is to suppress crime, and not organize crime in order that he may punish somebody."

Hearne v. State, 165 S. W. (Texas), 603—from dissenting opinion.

"The offer of a bribe upon the suggestion of an officer that he will accept it is not punishable."

O'Brien v. State, 6 Tex. App., 665.

"But our duty to public justice and decency requires us to dispose of the other views of the case. In some of its features it is one of the most disgraceful instances of criminal contrivance to induce a man to commit a crime in order to get him convicted that has ever been before us. If the prisoner's statement is believed, and the Court in the latter part of the charge seems to have assumed it was probable, he was not the active agent in the crime, but guilty of aiding and abetting Flint and therefore only guilty if Flint was guilty.

"But it would be a disgrace to the law if a person who has taken active measures to persuade another to enter his premises, and take his property, can treat the taking as a crime, or qualify any of the acts done by invitation as criminal. What is authorized to be done is no wrong in law to the instigator. . . . If the transaction which is the basis of the prosecution was actually designed, as it was actually expected by the persons in the store, they deserve something more than censure for such a scheme."

People v. McCord, 76 Mich., 200, 42 N. W., at page 1108.

As will appear from the authorities cited above, the line of cleavage between those decisions justifying the employment of detectives to secure evidence against suspected criminals or to send decoy letters to ascertain whether crime has been or is about to be perpe-

trated, and those which look upon the creating of criminals by officials as being abhorrent to the law is a very marked one. In the instant case the record discloses without contradiction that the Government officers acted with a view to "getting a hold" on Woo Wai in order to procure information from him as to crimes suspected to have been committed in San Francisco (but not by him), and to this end and for this purpose the scheme or trap was laid to procure Woo Wai to commit a crime in order to get such a hold upon him. And these sworn officers of a great Government have plainly disclosed their contemptuous indifference or rather their eager desire to create a criminal of a man never before charged with the violation of any law, not even a municipal ordinance of an American city in which he had lived for more than thirty years.

Respectfully submitted.

DENIS and LOWENTHAL,
C. H. SOOY, and
J. C. CAMPBELL, WEAVER,
SHELTON and LEVY,
Attorneys for Plaintiffs in Error.

6

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Woo Wai, Wong Chung and
Wong Yee,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

No. 2507.

BRIEF OF DEFENDANT IN ERROR.

ALBERT SCHOONOVER,

United States Attorney.

HARRY R. ARCHBALD,

Assistant U. S. Attorney.

Filed

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

JAN 28 1915

F. D. Monckton,

Clerk.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Woo Wai, Wong Chung and
Wong Yee,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

No. 2507.

BRIEF OF DEFENDANT IN ERROR.

IN RE "THE STORY."

If there had been anything at all in the facts adduced on the trial of the present case, to in any way justify the astonishing "story" which burdens the first pages of the brief for plaintiffs in error, and after such matters had been argued to the jury with the eloquence and force that a justly indignant counsel would have in such a case, the most optimistic prosecutor would, and rightly should, expect at the hands of a jury of twelve men exercising the supreme discretion vested in them, nothing but a verdict of "not guilty." But even if the jury in such a case, mindful of the

charge given by the judge, should have returned a verdict of "guilty," we would rightly expect to find accompanying such verdict, the strongest recommendations of mercy and some expression of the disgust the jury would necessarily have for officers capable of devising such "a nefarious scheme" and of putting it into execution. But even if the jury should fail to be touched by such a state of facts (which is impossible to conceive), no just judge could fail to be impressed, and would exercise the discretion vested in him by the imposition of the very minimum penalty and then of remitting that. But that alone would not meet the requirements of justice in such a case as that portrayed in such "story." Any officials who could so far forget the principles that one would expect to find present in a high degree in men of the standing and character of the gentleman attacked therein, would and should receive the severest verbal castigation in open court from the judge on the bench. Imagine the astonishment of any one, then, on searching the record of the case, to find that the jury returned a verdict of guilty, without a sign of a recommendation for leniency, or condemnation of the officers in charge of the gathering of the evidence, and on further finding that the judge before whom the case was tried, who heard all the evidence and saw the witnesses, instead of so exercising the discretion vested in him and imposing the minimum fine, with severe criticism for the conduct of such officers, without any criticism at all of such officers, imposed upon the defendant, who, counsel would have us believe, is an honest and honorable

Chinaman, made a criminal by the “machinations and outrageous traps of government officials,” a fine of \$5000.00 and eighteen months at McNeil Island [Tr. 21], in a case where the maximum punishment provided is a fine of \$10,000.00 and two years’ imprisonment.

Further comment upon “The Story” and its continuation and emphasis in counsel’s statement of the facts would seem to be unnecessary.

STATEMENT OF FACTS.

Believing that counsel for plaintiffs in error have relied too much in their statement of facts on the evidence of witnesses who, as Justice Field in the Chinese Exclusion Case (130 U. S. 581, 598) says, entertain “loose notions of the obligation of an oath,” and which notions are disclosed in the present case in the testimony given by such witnesses, we desire to controvert such statement of facts, and to briefly state the facts as they would seem to be from an unbiased reading of the record, and as they undoubtedly appeared to the judge and jury before whom they were presented.

In August, 1908, Professor Sanford of Stanford University was put in charge of the investigation of violations of the immigration laws on the Pacific Coast, in which work he continued until March 1, 1909 [Tr. 63].

He had evidence and reports that one Woo Wai was engaged in importing Chinese prostitutes in San Francisco, and wanted to get hold of him so as to make him tell who his confederates were [Tr. 83], believing

them to be parties connected with the Immigration Service [Tr. 78].

To get information of Woo Wai's operations, he employed one G. M. Roy (whose testimony, fortunately for Woo Wai's story, as we believe, is not in the record, for the reason that the great United States with all its power could not find or produce him at the trial, much as it desired to do so) to act in connection with his investigation and to report to him [Tr. 63]. Woo Wai had known Roy for several years [Tr. 137] and was very intimate with him [Tr. 152]. If Woo Wai's testimony is to be believed (which we submit is not the case), Roy immediately proceeded to induce him to meet Weddle and Conklin. The more reasonable assumption is that Woo Wai kept from Roy the facts as to his operations in San Francisco, just as he did from Weddle and Conklin the actual details of the operations of the enterprise they were supposed to be assisting, and that Roy dropped the word that Weddle and Conklin were friends of his, whereupon Woo Wai seized upon an opportunity to extend his operations into new fields. On October 26, 1908, Woo Wai, accompanied by Roy, appeared in San Diego [Tr. 69] and met Inspectors Weddle and Conklin, who were advised beforehand that Roy would be there with someone who would make them an offer to which they should apparently consent [Tr. 77 and 116].

(As to who paid the expenses the record is silent, except for the impossible story of Woo Wai. K. C. Lanier says that he wouldn't be positive as to who paid the hotel bill at San Diego, but that he has it

on his books as having been paid by Roy. That is probably true, as Roy's knowledge of English would make him the spokesman of the party, even if the prominent Chinese merchant furnished the money he paid.)

Roy introduced Conklin and Weddle to Woo Wai as his friends, although neither knew him before [Tr. 78 and 116], whereupon Woo Wai said that if they would allow Chinese to come from Mexico and pass through their district that he would pay Weddle and Conklin \$50.00 apiece upon their safe arrival at destination. Acting under their instructions they apparently assented to the proposition [Tr. 70, 78 and 117].

Woo Wai and Roy went back to San Francisco and Woo Wai afterwards came to Conklin's house in San Diego with defendants Wong Chung and Wong Yee [Tr. 79 and 117], Wong Chung being a business partner of Woo Wai [Tr. 143], and Woo Wai's former offer was repeated and apparently accepted [Tr. 79 and 118], at which time Woo Wai said he would send Wong Yee to Ensenada to make arrangements to bring Chinese into the United States [Tr. 120], and Woo Wai suggested Orange as a good shipping point, to which Conklin agreed, as he was familiar with the place and could apprehend the contrabands there easier [Tr. 125, 126 and 69].

Wong Yee went to Ensenada and reported to Conklin that he had secured an agent there to handle the business, and that a party would soon be on the road [Tr. 120].

Weddle never met Roy but the one time [Tr. 75]. Conklin saw Roy twice, the last time being in the latter part of November, 1908, and never corresponded with him [Tr. 123], and Roy had nothing to do with the business, so far as Weddle knew, after 1908 [Tr. 81].

Nothing came of these proposals, so far as the record shows, and Conklin and Weddle were not making any investigations for Professor Sanford after December, 1908 [Tr. 79], and all the government officials interested considered the incident closed [Tr. 88, 89 and 126], as Professor Sanford had written Woo Wai that his visits to San Diego were known and that if he continued to try to smuggle Chinese into the United States it would result in arrest and probable conviction [Tr. 89]. Conklin and Weddle did not see Woo Wai or have any communication with him after November 16, 1908, until the latter part of March or the first of April, 1910, except the receipt from him of some presents about Christmas, 1908 [Tr. 79 and 123].

The 1st or 2nd of April, 1910, Conklin received a letter [U. S. Exhibit 5, Tr. 65] from Woo Wai [Tr. 96] saying that Woo Wai and Wong Yee would be in San Diego and wanted Conklin to be home Saturday night, April 3, and have Weddle there. Conklin and Weddle kept the appointment made by letter and met Woo Wai, Wong Yee and Wong Chung [Tr. 65 and 96].

The letter of March 31, 1910, was the first letter Conklin received from Woo Wai [Tr. 115], and it

came to Conklin without any instigation whatsoever [Tr. 123].

Woo Wai said they could no longer do business in San Francisco and so came down to see Conklin and Weddle [Tr. 65, 80 and 97], and made the same proposition to them that he had made on two former occasions [Tr. 65 and 97]. This visit was a surprise and Conklin and Weddle wanted time to report the matter to their superiors [Tr. 97], which was done by Weddle, and he was instructed to obtain further evidence against Woo Wai to make a conviction [Tr. 87 and 88].

Conklin received a letter [Tr. 70] from Woo Wai advising him that six men were coming and to care for them [Tr. 97]. Efforts were made without avail to apprehend these contrabands [Tr. 71 and 73]. They were afterwards informed by Woo Wai, in letter [Tr. 71] and conversation with them at San Diego, of the safe arrival of the six Chinese at San Francisco, and were paid \$250.00 for the six so entering successfully [Tr. 72 and 98].

Not hearing anything more for some time, it was determined to send Conklin to San Francisco to ascertain if they were still bringing Chinese through [Tr. 100].

Conklin met Woo Wai November 27, 1910, who said as soon as he saw Conklin, "My God! Now you no get my letter!" and who told Conklin that he had sent him two letters—the 23rd and 24th—advising that there were seven or eight men coming from Ensenada [Tr. 100, 102, 103].

Conklin advised Weddle, and efforts were made to apprehend the contrabands [Tr. 94, 95 and 104]. Various letters were written and telegrams sent by Conklin to Woo Wai to draw out definite information as to the whereabouts of the eight contrabands [Tr. 84, 86 and 87] and some information was developed [Tr. 108, 109, 111], the definite information that led to the arrest of the contrabands and defendant Wong Chung and Wong Wing Sai coming in a letter from Woo Wai dated Jan. 9, 1911 [Tr. 112], and through such contrabands the chain of evidence was developed connecting the activities of the defendants with an actual and provable importation of contrabands, in which some of the contrabands themselves, and one of the guides, were living exhibits and witnesses. (See testimony of Pedro Valenzuela [Tr. 30], Quan Bo [Tr. 55], Wong Ging Wee [Tr. 57], Wong Dom Him [Tr. 59], Wong Sun [Tr. 61] and Wong Ging Foon [Tr. 62]).

POINTS AND AUTHORITIES.

The only errors specified in the brief of plaintiffs in error are in the refusal of the trial judge to give certain requested instructions and in his having given certain other instructions. (Plaintiff's Brief 13.)

While we believe this record fails absolutely to support the contention of plaintiff in error as to what took place, and that the efforts and actions of all officials engaged were entirely in the line of their respective duties and highly commendable, still, in view of the fact that the instructions given and refused

involve even the facts of an extreme case and one in which the action of the officials would have been as reprehensible as they were commendable in this case, we want Your Honor to understand our position thoroughly before we proceed further. For officials violating their duties toward the government, as counsel would have you believe the officials in this case did, we would of necessity have feelings of the deepest disgust and would join with counsel in excoriating them and condemning such actions. We could not, however, join counsel in asking that a greater public wrong be done simply because of the acts of such officials. There is an ample remedy in the hands of the courts to meet such a situation when it confronts them, sustained by principle, and which violates no other principle of public policy, and does not, as the remedy counsel asks you to put into effect, leave a great door open for the miscarriage of justice in many cases at the hands of a jury made oversympathetic, or unjustly indignant by an eloquent counsel.

The substance and effect of the instructions requested by defendants below, and upon the refusal to give which error is specified, is that notwithstanding the fact that defendants violated a criminal law of the United States, if the defendants were advised, instigated, suggested, induced or procured to commit such crime, by government officers, agents, or persons acting under the employment of such officers, the jury should find such defendants not guilty. Such instructions would seem to amount to a demand that the jurymen violate their oaths.

“Whoever ‘aids, abets, counsels, commands, induces or procures’ the commission of any act constituting an offense defined in any law of the United States ‘is a principal.’”

Sec. 332, Act March 4, 1909, ch. 321.

The language above does not exclude government officers and agents and persons employed by them, but includes them, and in the extreme case pictured by counsel a very proper instruction would have been that such officers, agents and persons were themselves guilty of the offense. The guilt or innocence of the officers, however, should not cause others guilty of the same offense to be declared not guilty.

It is safe to say that every crime committed by two or more persons is suggested, instigated or induced by some one or more of such persons, and yet no one would be foolish enough to suggest that as a defense. The judge would, no doubt, take into consideration the situation of the parties and the manner and cause of their participation, in determining the sentences to be imposed, and that is all that could justly be asked. Why should a different rule prevail where the suggestion, instigation or inducement came from a government officer, employee, agent, or person acting under their employment?

No officer or agent of the government has the right or power to authorize the commission of an offense against the laws of the United States, nor to procure another to violate its laws, nor to protect anyone found violating the laws from arrest. No argument is necessary to support the foregoing propositions, and some

such authority would be absolutely necessary to support the requested instructions on principle. In view of which we submit that the instruction given by the trial judge, to the effect that it is no defense to the guilty that government officers or agents instigated the crime, is sound.

The defendants ask the court to sustain a principle of public policy in a manner which strikes down several such principles that are equally as great, if not greater than the one for which they contend. We desire to impress upon the court that we stand for the enforcement of the same principles of public policy that plaintiffs in error demand enforced, but we also insist upon the maintenance of the great principle that the government of the United States is not barred, bound or estopped by the acts of its officers and agents, and that no acknowledged offender against its laws shall be declared "not guilty."

In citing and discussing the authorities on this question we should distinguish at the outset the instant case, involving as it does a conspiracy to violate a law designed to facilitate the performance of a governmental and public duty, to-wit, the exclusion of Chinese laborers, from a law designed for the protection of private property and interests. Many of the cases cited in the brief of plaintiff in error are of the latter class, involving charges of larceny and burglary, where want of consent of the owner of the thing stolen or house entered is an essential element of the crime. Necessarily, where such owner procures another to carry away his property or to enter his house, the act

is not against the consent of the owner, but with it, and hence no crime is committed. The principle is well stated in the following quotations:

“We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. In cases of alleged larceny, where the master has directed a servant to deliver his property to a thief, or burglary, where he has directed the admission of the burglar, the principal element of the offense is lacking; in the former there is no felonious taking, in the latter no felonious breaking and entering.”

People v. Liphart, 105 Mich. 80, 83, 84.

“While generally private persons cannot license crimes, and it is no palliation or excuse that a wrongdoer had anybody’s permission, there are exceptions to this general rule, because there are certain acts which the law makes criminal when and because done without consent, the doing of which with consent is not legally reprehensible.”

State v. Waghalter, 177 Mo. 676, 686.

The following cases cited and quoted from in the brief for plaintiffs in error involve either the offense of larceny or burglary:

People v. Hanselman, 76 Cal. 460;

Connor v. People, 18 Colo. 373, 25 L. R. A. 341;

Love v. People, 160 Ill. 501, 32 L. R. A. 139;

State v. Currie, 13 N. D. 655, 69 L. R. A. 405;

People v. McCord, 76 Mich. 200, 42 N. W.

The following cases cited in such brief involve the sale of liquor contrary to municipal ordinances:

People v. Braisted, 13 Colo. App. 532, 58 Pac. 796;

Wilcox v. People, 17 Colo. App. 109, 67 Pac. 343;

Scott v. State (Tex. Cr. App.), 153 S. W. 871;

Bush v. State (Tex. Cr. App.), 151 S. W. 556;

Hearne v. State (Tex. Cr. App.), 165 S. W. 603.

(This latter case does not involve question as a defense.)

We submit that the following cases lay down the true rule governing such cases, as well as the instant case:

“We cannot agree with the reasoning of the Colorado court. It would be applicable to the commission of that class of crimes in which the want of consent of the owner of property to its taking or destruction was a necessary element of the offense. In such cases the owner of the property taken or destroyed might, by his conduct in employing a detective to entrap a person suspected of crime, destroy the element of want of consent to such taking or destruction of his property, and hence no crime would be committed by such taking or destruction. But can a man consent to an assault upon himself, and thereby free the perpetrator of such an assault from legal responsibility? Can an officer consent to the commission of a crime and by so doing free the act of its criminal character? A private individual may be estopped in matters relating to his property by his own conduct. Is anyone else estopped by his conduct unless such other person is privy thereto? Has a public officer such property rights in his

office and in the enforcement of the law as by his conduct or consent to be able to estop the state in a prosecution of crime? If so, whose liberty, property, character, or life would be safe? There can be but one answer to these questions, and that is emphatically 'No.' The statement of these propositions amounts to their demonstration, and we deem it unnecessary to make any further argument or to cite authorities in support of our position, at least not until some reason is shown for a contrary view."

DeGraff v. State, 2 Okla. Cr. 519, 103 Pac. 538, 550. (On motion to strike out testimony of detective inducing sale intoxicating liquors contrary to law.)

* * * "The law alleged to have been violated was enacted for the benefit and protection of all the people, for the promotion and preservation of their health, sobriety, thrift, peace, and safety. It was not enacted in the special interest of the prosecuting officers, and a violation thereof is an offense, not against the prosecuting attorney, but against the state. Prosecutions for offenses of this character are in the interest of the public solely, and the prosecuting officer can neither repeal the law, pardon the offender, nor grant indulgences; nor can he lawfully give immunity except in those instances provided for by law. It is no less an offense to sell intoxicating liquor for any purpose to a sheriff or prosecuting attorney or to an agent or representative of either, than it is to sell to any one else; and a sale made to such officer or his agent, though solicited by him for the purpose of detecting the commission of the offense and of instituting a prosecution therefor, is punishable, and the officer's solicitation works no estoppel to a prosecution. The pith of the matter was well stated by Justice Vann in *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A.

131, when he said: 'We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it.'

"We are aware that there are some decisions which apparently uphold the doctrine contended for by plaintiff in error; but the overwhelming weight of authority, and in our opinion all the reasoning, is on the other side, especially in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnished evidence of a course of conduct. See *Onondaga County Com'rs v. Backus*, 29 How. Prac. (N. Y.) 33; *Tripp v. Flanigan*, 10 R. I. 128; *People v. Murphy*, 93 Mich. 41, 52 N. W. 1042; *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *People v. Everts*, 112 Mich. 194, 70 N. W. 430; *People v. Rush*, 113 Mich. 539, 71 N. W. 863; *City of Evanston v. Myers*, 172 Ill. 266, 50 N. E. 204; *State v. Jansen*, 22 Kan. 498; *State v. Stickney*, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; *United States v. Whittier*, 5 Dill. 35, Fed. Cas. No. 16 688; *Bates v. United States (C. C.)*, 10 Fed. 92, and note: *United States v. Moore (D. C.)*, 19 Fed. 39; *United States v. Dorsey (D. C.)*, 40 Fed. 752; *Shepard v. United States*, 160 Fed. 584, 87 C. C. A. 486; *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; *Andrews v. United States*, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727. In many instances habitual and flagrant violations of the liquor laws can be detected by no other means. The officer or his agent may furnish the defendant in such cases the opportunity to sell, but he does not furnish the defendant the liquor or the intent to sell; and the sale to an officer is not more meri-

torious or less criminal than if made to some other person. We find nothing in the law or in public policy forbidding the detection of both the offense and the offender in this manner, and we have no criticism to expend upon a public officer who may find it necessary or expedient to adopt this means of discovering infractions of this law."

Moss v. State, 4 Okla. Cr. 247, 111 Pac. 950, 952.

"In *People v. Everts*, 112 Mich. 194, and *People v. Rush*, 113 *id.* 539, it was held no defense in an indictment for an unlawful sale of liquor that it was made to a detective sent by a prosecuting attorney that he might use such purchase and sale as evidence. Indeed, the authorities are numerous, and it would cripple the effective enforcement of the criminal law if it were not permissible to thus procure evidence.

"There are some seeming exceptions, for instance, in larceny, whenever the conduct of the owner amounts to a consent that his property may be taken. The reason is that in larceny it is an indispensable element of the offense that the property shall be taken 'against the will of the owner.' Also, in proceedings for divorce, if the plaintiff secures some one to entice the defendant into illicit acts. The reason is that 'connivance is always a bar to the plaintiff's cause of action.' *Dennis v. Dennis*, 57 Am. St. 95. But as to prosecution for offenses, not against individuals, but against the public, like the present, it is no defense that the illegal sale was made to a party who bought not for his own use, but to aid in convicting the seller. It is not the motive of the buyer, but the conduct of the seller, which is to be considered."

State v. Smith, 152 N. C. 798, 799, 800.

“The methods adopted by the policeman to catch the defendant in the act of violating the law have been criticised; but it must be remembered that the ways of ‘blockaders’ are devious and their trade is generally plied ‘underground.’ However much the defendant, when caught, may criticise the methods used to catch him, it has been held that the transaction is, so far as the defendant is concerned, a violation of law, if the evidence is deemed by the jury sufficient proof of the facts.”

State v. Hopkins, 154 N. C. 622, 624.

“It further appears from the evidence that the prosecuting attorney of Butler county was informed of this arrangement and made no objection thereto. Appellant contends that on this showing the court should have *pro bono publico* dismissed the cases.

“Whatever may be said derogatory to the character of those who, as detectives, spies and informers, entrap the law-breaking class by gaining their confidence and practicing deceit upon them, it has never been ruled that they were incompetent witnesses nor that they might not tell the truth, nor is there any recognized public policy that condemns their occupation. On the contrary, the keen and shrewd detective is one of the greatest safeguards to urban life and a terror to the thugs and thieves that infest the cities of the country.

“* * * To discover and bring to justice those who subtly, clandestinely and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable, and when nothing more than the truth is elicited and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered.”

State v. Lucas, 94 Mo. App. 117, 121.

The brief of plaintiff in error also contains a quotation from the case of O'Brien v. State, 6 Tex. App.

665, to the effect that the offer of a bribe on the suggestion of an officer that he will accept it is not punishable. That case has been overruled by the later case of *Davis v. State* (Tex. Cr. App.), 158 S. W. 288. The court, on page 290 of the opinion, uses the following language:

“Considerable legal hair-splitting has been indulged in by courts and text writers in discussing this subject. It must be admitted at the outset that it is beyond the power of a private person to license the commission of a crime. As to these more serious crimes which are purely transgressions of the public right, it must follow that consent thereto of private persons directly injured thereby cannot, to any extent, purge such crimes of their character as public wrongs, nor render those who committed them less liable to punishment. The consent of a woman upon whom an abortion was performed constitutes no defense to a prosecution therefor. *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85; *Commonwealth v. Snow*, 116 Mass. 47. Similarly, consent of the deceased is no defense to a prosecution for homicide. *Regina v. Allison*, 8 Car. & P. 418. In a prosecution for bribery, the fact that the prosecuting witness was the giver of the bribe in question cannot excuse defendant. *Newman v. People*, 23 Colo. 300, 47 Pac. 278. Nor is the latter exculpated by proof that the bribery was instigated for the purpose of entrapping him. *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *State v. Dudoussat*, 47 La. Ann. 977, 17 South. 685.

“The offer to bribe a public official is a transgression of a public right, and the consent or non-consent of the officer cannot affect the criminality of the act of the person who makes the offer, and even though Mr. Wilson by his words, acts, and conduct may have been the inducing cause of the offer to bribe, yet, if appellant did, in fact, tender

money to the officer with the intention and for the purpose of influencing his action as such officer, he would be guilty under our statute. It would not be an offense against Mr. Wilson so much as an offense against the public welfare, and one which no officer would have the authority nor power to give his consent to."

Every decoy letter sent for the purpose of obtaining information declared non-mailable is a direct instigation and inducement of the specific crime upon which the indictment is based, and, in view of the other language in the case, we cannot believe the Supreme Court, in the case of *Grimm v. United States*, 156 U. S. 604, ever intended by the language quoted in counsel's brief (p. 19) to carry the idea that if it had been the purpose of the postoffice inspector to induce or solicit the commission of a crime, that that would have been a defense. The letters in question in the case were the ones induced and the crime was the result of such inducement, and why the purpose of the inspector should have any consideration in making the act an offense, or in taking away its offensiveness, is beyond conception. The letters were declared non-mailable by statute and were deposited in the mail by defendant, and that is all that is required to violate the act. The defendant in the *Grimm* case relied upon the cases of *United States v. Whittier* and *United States v. Adams*, cited in counsel's brief, and contended as counsel do here, that by reason of the fact that the letters of defendant were deposited in the mails at the instance of the government conviction could not be maintained.

The court, beginning at page 609, uses the following language:

“It is insisted that the conviction cannot be sustained, because the letters of defendant were deposited in the mails at the instance of the government, and through the solicitation of one of its officers * * *. This objection was properly overruled by the trial court. There has been much discussion as to the relations of detectives to crime, and counsel for defendant relies upon the cases of *United States v. Whittier*, 5 Dillon 35; *United States v. Matthews*, 35 Fed. Rep. 890; *United States v. Adams*, 59 Fed. Rep. 674; *Saunders v. People*, 38 Mich. 218, in support of the contention that no conviction can be sustained under the facts in this case.

“It is unnecessary to review these cases, and it is enough to say that we do not think they warrant the contention of counsel. It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official—a detective, he may be called—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. * * *

“The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person

who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt.”

The jury is not concerned with the good faith of the person who incites, by decoy letter, the sending of non-mailable matter through the mails.

United States v. Moore, 19 Fed. 39, 41.

The fact that a decoy letter is no defense is too well settled by modern authorities to be now open to contention.

Goode v. United States, 159 U. S. 663, 669.

“At the trial it appeared that the letters taken had been mailed for the purpose of detecting the defendant; in other words, were ‘decoy’ letters; and thereupon the defendant asked the court to instruct the jury that, as the letters taken were mailed for the purpose of entrapping defendant into the commission of a crime, there could be no conviction of the defendant for the taking of said letters.

“The refusal of the court to so charge is the subject of the first assignment of error.

“To dispose of this assignment it is sufficient to cite the case of Goode v. United States, 159 U. S. 663, where it was held that, in an indictment against a letter carrier charged with secreting, embezzling or destroying a letter containing postage stamps, the fact that the letter was a decoy is no defence.”

Montgomery v. U. S., 162 U. S. 410.

“As already pointed out, every essential element of a criminal conspiracy was present when they entered into this confederation. Upon what

ground, then, can it be claimed that the fact, that they would not have confederated had it not been for the deception and subterfuges resorted to and the promises made by the detectives, constitutes a defense? Certainly not upon the ground that if the defendants had performed acts to be performed by them they would have been disappointed in their expectation of receiving bribes therefor; nor upon the ground that the commonwealth is estopped by any action of its officers; nor upon the ground that the detectives' consent to acts which were to be performed by the defendants would have deprived their acts, if performed, of any essential element of criminality; nor upon the principle upon which it has been held in some cases to be no burglary where a servant to whom a scheme of burglary has been proposed tells his master or the police, and while apparently confederating with the burglar acts with the knowledge and advice of his master and lets the thieves into the house by opening the door. If there is any ground upon which the facts as to the part the detectives took in the formation of the conspiracy can be held to be a defense, it is upon the ground of public policy, and it is strenuously contended that an acquittal should have been directed for that reason. In general, one who has committed a criminal act is not entitled to be shielded from its consequences merely because he was induced to do so by another. There has been much discussion in the courts of this country and by the text writers as to the relation of detectives to crime, and many of their methods have been severely denounced. A few exceptional cases can be found where upon grounds of public policy the courts have refused to sustain convictions because of the abhorrent methods adopted to lure the accused into crime. Upon the other hand there are many cases wherein the courts, while in some instances condemning the methods employed by the detectives, have sustained the convictions, al-

though the particular crime charged would not have been committed had it not been for the deceptions or subterfuges or the suppression of the truth resorted to by the detective. Without declaring that under no circumstances ought the courts to direct an acquittal of a crime clearly proved upon the ground that the accused was entrapped into it by illegal and immoral detective methods, we are quite clear * * * this case [is] within the second class above mentioned, and that the court did not err in refusing to direct an acquittal upon the ground of public policy."

Com. v. Wasson, 42 Pa. Sup. Ct. Rep. 38, 53.

"Complaint is made by counsel for appellant by reason of the fact that the letters by Leonard, the inspector, to defendant were under the assumed name of a woman, but for which the pamphlet and defendant's letters would not have been mailed. A party who persuades another to commit a crime is an accessory, and as a witness is to be considered as such, and his testimony weighed accordingly. But when officers, or even a private citizen desirous of enforcing the laws, believes from general information, and as in this case, from the pamphlet reciting 'Woman's Doctor,' 'Woman's Friend,' 'Woman's Syringes,' 'Woman's Antiseptic Germ Killing Powders,' 'Consultations only at my offices,' 'Syringes sent by freight only,' then the officer had the legal, as he had the moral, right to send 'decoy letters.' It is now too late to complain of decoy letters in such a case."

Ackley v. U. S., 200 Fed. 217, 222.

"Another contention of the accused is, that the paper alleged to have been mailed was sent in response to a decoy letter, and, for that reason, no crime was committed. It is only necessary to say that that question has been disposed of ad-

versely to the defendant's contention by *Grimm v. United States*, 156 U. S. 604, 611. In that case it was said: 'The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under those assumed names, and received his letters, was a government detective, in no manner detracts from his guilt.' That doctrine was again announced in *Goode v. United States*, 159 U. S., 663, 669, in which case it was said that the fact that 'certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a government detective, was no defence to an indictment for mailing such prohibited publications.' "

Rosen v. U. S., 161 U. S. 29, 42.

In view of the above decisions the language quoted by counsel from the case of *United States v. Jones*, 80 Fed. 513, 514, loses all its force as an authority in the present case. The learned judge frankly says farther on in the opinion that he would have followed the rulings of some of the circuit courts discouraging prosecutions based on decoy letters if the Supreme Court had not unmistakably decided that such prosecutions must be sustained.

Where defendant, charged with an attempt to commit abortion, was arrested by officers concealed in an adjoining room after he had placed the patient on an operating table, arranged his instruments, and was about to give the operation, it is no defense that the

arrest was made pursuant to a previous agreement between the patient and the officers.

People v. Conrad, 92 N. Y. Supp. 606.

“The defendants also claim that no judgment should be entered in this case because there is no evidence that they ever made any other shipment of such water in interstate commerce, and the evidence shows that the shipment on which the indictment was based was secretly induced by a government detective in order to create a basis for a criminal charge. There is no evidence that the defendants ever before sold or shipped water outside of New York city. The inspector who ordered the water at Newark had his office in New York. His only apparent object in going to Newark to order this water was to secretly lure the defendants into an act which would enable him to make a criminal charge against them. This was a perfectly wholesome water, and, if there was no other justification for the inspector’s proceeding than appears in the evidence, I think his course of action was one of unnecessary zeal. If there were no bottles to be found in other states which had been voluntarily shipped there by the defendants, whatever public evil might result from the sale of such water in New York city might wisely, in my opinion, have been left to be dealt with by the state authorities. The pure food act is a beneficial act; and it will be a matter of regret if the inspectors of the Department of Agriculture arouse hostility to it by excessive zeal to institute trivial prosecutions. But there may have been valid reasons for the course which was taken which did not appear on the trial; and, in any event, I am not willing to hold that because some criticism may perhaps be made on the manner in which the proof was obtained the proof itself was invalid or insufficient.”

United States v. Morgan, 181 Fed. 587, 588.

One who has committed a criminal act is not entitled to be shielded from its consequences merely because he was induced to do so by another.

State v. Abley, 109 Ia. 61, 46 L. R. A. 862, 863.

“His Honor gave no illustration of circumstantial evidence, and finally instructed the jury that there was nothing, legally or morally, wrong for persons to lay a trap, or conspire with others, to detect a culprit; that that has nothing to do with the guilt or innocence of the accused—to all of which we heartily subscribe. The fact that a plan was laid to catch the offender may warrant the jury in scrutinizing the testimony a little more carefully, we do not deny; and there was nothing in the charge to contravene this idea. Indeed, the guilt of the defendant is too manifest to talk about the proof.”

O'Halloran v. State, 31 Ga. 206, 209.

A case in which it was strenuously urged, as here, that it was the purpose of the government officers to create crime rather than to detect it and for that reason no crime was committed, is that of *People v. Mills*, 178 N. Y. 274, 67 L. R. A. 131. In that case violation of the property rights of the state was involved, which we submit is of even less importance than a violation of the governmental rights and duties as in the present case, yet the reasoning is particularly applicable here, and we quote freely from pages 135 and 137 of the opinion as reported in the L. R. A.:

“In view of the able and exhaustive opinion of the appellate division, the only question we feel called upon to consider is that raised by the challenge of the learned counsel for the appellant in

the nature of a demurrer to the evidence. He claims that, even on the assumption that all the evidence for the prosecution is true, still the facts thus proved do not constitute the crime charged in either count of the indictment. His argument is that the object of the district attorney was not to detect, but to create, a crime; and that no crime was committed by the defendant in taking the indictments into his possession, because he took them with the consent of the state as represented by the district attorney. The flaw in this argument is found in the fact that the records were the property of the state, not of the district attorney, and that the latter could not lawfully give them away, or permit them to be taken by the defendant. Purity of intention only could prevent the action of the district attorney from being a crime on his part. This is true also as to the detective, for, if either had in fact intended that the defendant should permanently remove the indictments, and steal, appropriate, or destroy them, he would have come within the statute. Neither of those officers represented the state in placing the records where the defendant could take them, but each was acting as an individual only. Neither had the right or power, as a public officer, to deliver them to the defendant, and, if either had acted with an evil purpose, his act would have been criminal in character."

"We shall not review the authorities cited on either side, for that duty has been so thoroughly discharged by the appellate division that we can throw no further light upon the subject. We merely state that an important distinction between this case and those relied upon by the appellant is found in the difference between public and private ownership of the property taken by the accused. In most cases some third person is injured by the crime, and is directly or indirectly the complainant, but in this case the state was, as it must

be in all criminal cases, the prosecutor, and it was also the injured party, for its property was the subject of the attempt at larceny. If an individual owner voluntarily delivers his property to one who wishes to steal it, there is no trespass; but when the property of the state is delivered by any one, under any circumstances, to any person for the purpose of having him steal it, and he takes it into his possession with intent to steal it, there is a trespass, and the attempt is a crime. The state did not solicit or persuade or tempt the defendant, any more than it took his money when he handed it over to the detective. Neither did the district attorney, as such, but Mr. Jerome did, acting as an individual, with the best of motives, but without the authority of law, and hence his action did not bind the state. While the courts neither adopt nor approve the action of the officers, which they hold was unauthorized, still they should not hesitate to punish the crime actually committed by the defendant. It is their duty to protect the innocent and punish the guilty. We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers, and held out a bait. The court do not look to see who held out a bait, but to see who took it. When it was found that the defendant took into his possession the property of the state with intent to steal it, an offense against public justice was established, and he could not insist as a defense that he would not have committed the crime if he had not been tempted by a public officer whom he thought he had corrupted. He supposed he had bought the assistant district attorney when he handed over the money, but he knew he had not bought the state of New York, and hence that the assistant had no right to give him its property for the purpose of enabling him to steal it."

The above case would seem to be particularly applicable to an extreme case of instigation to commit crime by federal officers charged with the duty to detect and suppress such crime, as well as to the case at bar. Only "purity of intention" would prevent the action of an overzealous official from being itself a crime, but the criminality or lack of criminality on the part of such official should not affect the criminality of anyone else. It is a law of the United States that is violated, not one for the protection of the official himself, nor one in which the consent or non-consent to its commission could possibly be a material and essential element of the offense. Any official overstepping the well recognized limits in such a case does not in any sense represent the government. The government in such a case would not instigate the crime or tempt the defendant, neither would the official, in his official capacity, perform such act. His would be an individual act, although the defendant in such a case would hope that by his supposed connivance with such individual he had stayed the official hand and avoided the consequences of the law he knew he was violating, and, as the court well remarks in the last case cited, while such a defendant might suppose he had bought a public officer of the government, he would know he had not bought the government, and even though he supposed the hand of the official were tied by his complicity, he is bound to know that the hand of the government cannot be so tied.

The principle contended for by counsel would bind the hands of the government absolutely, and, as stated before, open yet another door for an eloquent counsel to reach the jury and play upon the sympathies and feelings of such body, that must result in the miscarriage of justice in many instances.

Under the instruction given, the trial judge has it absolutely in his hands to impose upon any defendant found guilty of a crime which he actually committed, but into which he was drawn by some unscrupulous official, such sentence as meets the ends of justice, and at the same time deal with the offending official from the bench in such a way as to effectually avoid a repetition of the offense, and certainly public policy could require no more than this.

The only consideration such a defendant can justly ask is leniency at the hands of the judge, and the evidence would fully disclose to the judge the degree his discretion in that particular should be exercised, if at all.

The record discloses an objection to any evidence being taken under the indictment on the ground that it fails to state an offense and fails to allege the doing of an overt act in pursuance of the conspiracy [Tr. 27], and is the only challenge of the sufficiency of the indictment shown by the record.

Objections to the sufficiency of an indictment cannot be raised by objecting to the introduction of evidence thereunder.

Numberger v. United States, 156 Fed. 721, 725.

There being no other errors properly assigned, and believing the record fails to disclose any, we submit the judgment should be affirmed.

ALBERT SCHOONOVER,

United States Attorney.

HARRY R. ARCHBALD,

Assistant U. S. Attorney.

No. 2507

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WOO WAI, WONG CHUNG and WONG YEE,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

**Oral Argument and Reply Brief of
Plaintiffs in Error.**

Denis & Loewenthal; C. H. Sooy;
J. C. Campbell; David L. Levy; and
J. C. Campbell, Weaver, Shelton & Levy,
Attorneys for Defendants.

Filed this.....day of March, 1915.
F. D. MONCKTON, Clerk,
By....., Deputy Clerk.

GEO. R. ARMSTRONG, Printer

Filed

MAR 2 - 1915

F. D. Monckton

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

WOO WAI, WONG CHUNG and WONG YEE, <i>Plaintiffs in Error.</i>	}	No. 2507.
vs.		
THE UNITED STATES OF AMERICA, <i>Defendant in Error.</i>		

ORAL ARGUMENT AND REPLY BRIEF OF
PLAINTIFFS IN ERROR.

ORAL ARGUMENT OF J. C. CAMPBELL, COUNSEL FOR
DEFENDANT.

While we have read a great many cases wherein officials of sovereign powers have gone out of their way for the purpose of attempting, as they may claim, to discover crime that is being committed, this case goes further than any reported in the books, because it displays a most remarkable state of affairs, reaching up to the presidential family, the Secretary of Com-

merce and Labor. The official activity involved here was not purposed to discover whether a citizen or an alien within the boundaries of the United States was engaged in the commission of a crime or a series of crimes, not to procure evidence to convict that person. The story of this case is remarkable. It may be that the officers of the United States thought it was a comedy; it turned out to be, according to this record, a great tragedy. And it runs thus: Two college professors, Professor Jenks of Cornell University, and Professor Sanford of Stanford University, were appointed by the Secretary of Commerce and Labor to investigate the officers of the Immigration Department on the Pacific Coast. For some reason undisclosed by the record and undisclosed at the trial in the court below, they became imbued with the idea that Woo Wai, one of the plaintiffs in error here, a merchant in San Francisco of almost forty years—a man whom the record shows was of unimpeachable character—knew something about the actions of the immigration officials. They sat down and planned among themselves—wonderful as it may be that these men who have been selected to teach the youth of America should do this—these men sat down and planned that they would induce this Chinaman to commit the semblance of a crime, not for the purpose of determining whether or nay he was indulging in a course of crime, but for the purpose of making him come through and inform against the immigration officers.

With that in view, the record shows that they employed a detective by the name of Roy, who had formerly been a jeweler in San Francisco and had taken up the business of discovering crimes by various nefarious means. He and Professor Sanford, professor of Physics at the Stanford University, conceived a plan whereby Woo Wai, through the intervention of the editor of a Chinese newspaper, was procured to consent to a meeting with Roy. Roy was not present at the trial; the defendant with the means within his power could not procure him, but the record reads so plain that he who runs may read that the plan was to get Woo Wai to agree to a semblance of a violation of the law for the express purpose, as the inspectors said, to make him "come through" on these other persons. He met Woo Wai and told Woo Wai that he knew how they could make money. Woo Wai asked him how, and he said "You will find out later." After several trials he finally induced Woo Wai to accompany him to San Diego. The journey was made at the expense of the Government of the United States, which paid the railroad fare, for the Pullman accommodations, and the hotel bill. At the Lanier Hotel in San Diego he was met, under appointment by Professor Sanford, by one of the immigration inspectors. The name of the inspector was Conklin. From thence he was taken to the Customs House and was introduced to Weddle, the inspector in charge. The evidence shows that Roy, in the

presence of Woo Wai, made to these people a proposition which they knew was going to be made to them, that they should permit Chinamen to come across the Mexican border, and should receive \$50 a head.

The Chinamen stated that they could not go to Mexico, and it was then suggested by one of the immigration officers that they go to Ensenada, that there were between 300 and 500 Chinamen that wanted to come across from Ensenada and that a Chinaman should go there and arrange an agency whereby Chinese could come across the border into the United States. They explained to him how it could be done; that the Chinamen who came under the escort of Mexicans whom the officers would secure should wear a handkerchief in a certain way. But that is not all. They later obtained written permission from Mr. Straus, the Secretary of Commerce and Labor, to allow the Chinaman Wong Yee to go across the border for the obvious purpose of establishing this agency and to return. He did go. He came back, much to the disgust and indignation of the immigration commissioners, according to the record—and I am speaking from the record—and said he was unable to obtain any Chinamen to come across the border because they all thought he was connected with the government of the United States. The defendants had returned to San Francisco, and after the matter had slept until sometime thereafter—over a year—it was stirred up again, if I am permitted to use the expression, by the

immigration officers under the dictation of the parties at Washington. A letter was written to Woo Wai, and that was not sufficient; Conklin came to San Francisco, went to the house of Woo Wai and there suggested that it was a hard trip for the Chinamen to come over land and that he, the inspector, knew a man by the name of Jock, or Jack, who had a boat, and who would bring them over and then they would be taken care of by the inspectors. There was no such person in existence, as he admits, as Jock or Jack; he came up here simply for the purpose of obtaining some written evidence from Woo Wai for the purpose of accomplishing the government's project. He did obtain a letter written to the fictitious person by the hands of Woo Wai and another Chinaman named Mar Jick.

Finally, after months of persuasion, of inquiries by the officials asking: "What's the matter you?" of description of the feasible routes by marking the towns upon a map, showing Orange and Santa Ana, it was arranged that Chinamen should be brought across the border. Woo Wai was almost within their grasp. Some Chinamen crossed under Mexican escort but when the immigration inspectors attempted to swoop down upon them the Chinamen had flown. So Conklin went to San Francisco to induce Woo Wai to bring more Chinamen across. The second time the inspectors were more circumspect and the contraband were

arrested. For this the defendants were indicted, tried and convicted.

By way of illustration I will read to you a letter written by Mr. Sanford to Mr. Conklin, which shows the character of this transaction better than my words can express it. It is dated December 2, 1908. It is on the letterhead of the Fairmont Hotel, San Francisco:

"Dear Conklin:

"I have seen our friend since his return, and I think we will make matters all right yet. If someone else comes down there, tell Weddle to let them through anyway. I suppose he has received the telegram from Sec. Straus concerning Hoo Wai. The secretary wired me that he would instruct him to let him pass. I will stand the responsibility of your letting another man through if necessary. Use him yourself for all he is worth."
(Trans., p. 67.)

In connection with that letter the testimony of Weddle is as follows:

"I received the telegram the 24th or 25th; I think the 24th. I did not know what parties were coming. Professor Sanford told me in a previous interview that he wished to get certain information regarding San Francisco, and any party that came down to see me and interview me, to apparently consent to any offer they made. I told him at that time I would not do anything to break the law, but would apparently consent. I never intended to break the law, nor to enter into any conspiracy with Woo Wai or anybody else to break the law. All I wanted was to find out what they wanted

to do, and I followed it subsequently for the purpose of trying to arrest them. That was not my intention from the start, as I thought Professor Sanford wanted to get certain information from Woo Wai and wanted to get a hold on Woo Wai to get that information.

"Q. And Professor Sanford wanted to get information in relation to Dr. Gardner and Mr. North of the Immigration Commission in San Francisco?

"A. He didn't tell me that.

"Q. The Immigration officers there?

"A. People connected with the immigration offices. He didn't say who. I believe he wanted a hold on Woo Wai to make Woo Wai tell him those things.

"Q. And that is the purpose for which you entered into all those things?

"A. That was the first part; yes. I received the telegram dated October 25th in due course; the day before Mr. Roy and Woo Wai came down there."

The telegram was as follows:

"Party will call Conklin's home tomorrow Monday evening please be within reach. Sanford."

Under Section 2 of the Act of April 29, 1902 (32 Stat. 176, U. S. Comp. Stat. Supp. 1905, page 296), the Secretary of Commerce and Labor has the authority to change or modify the rules concerning Chinese immigration. He can, as he does, for example, permit Chinese laborers to come into the country for the purpose of the Panama Pacific Exposition. So he consented that this opera bouffe should be staged; that

the officers should induce these Chinamen to believe that they would cooperate with them in bringing Chinese laborers into the United States. He gave specific authority to a visit by Woo Wai to Mexico and return—a privilege which Wong Yee, under the persuasion of the officials, used. It was never the intention of any of the representatives of the government that a crime should be committed; it was never their intention that any Chinese contrabands should find a permanent abode in the United States or that any should come into the country at all except for the express purpose of getting a hold on this man, as they say, so that they could “use him for all he was worth” and compel him then to give testimony against other people.

The charge here is conspiracy. To constitute this there must be a meeting of the minds of the parties accused in an unlawful purpose—a purpose which if consummated would be a violation of the law. The record here shows, as I have pointed out, that there was no intention on the part of the government that a Chinaman should come across the border except for a temporary purpose and this accomplished, the contraband should be returned. Such was the course actually pursued. In these circumstances, it follows that the essentials of a conspiracy to violate the law of the United States were not present, and under the evidence no conviction could properly be had. If, as the dis-

strict attorney asserts, the government officers did not conspire, then the defendants did not conspire.

This idea was given expression in the case of

Woodworth v. The State, 20 Tex. Crim. App.,
375.

There the charge of conspiracy was based upon the cooperation of the defendant with another who, however, entered into the unlawful purpose without criminal intent and solely with the design of entrapping the defendant. The court held:

“Such being the recognized meanings of the term ‘agreement,’ we are of the opinion that the transaction between Hunt and the defendant did not constitute such a union of their minds, such a concurrence of purpose, intention and determination, as the law contemplates in defining a conspiracy. Hunt at no time intended to commit, or to assist in the commission of, the burglary. His assent that it should be committed was feigned, not real. If it was in the mind of the defendant to commit the burglary, Hunt was not of the same mind, for he did not intend to commit it or aid in its commission, but on the contrary he intended to prevent its commission. There was in fact no agreement on his part to engage in the commission of the burglary. There was in fact no union or concert of his will with that of the defendant, and such union or concert of wills must exist to constitute conspiracy (2 *Bish. Cr. Law*, Sec. 190). A conspiracy cannot be committed by one person alone (*Id.*, Sec. 187).

“This being our view of the law, we hold that the evidence fails to prove a conspiracy, and the

conviction is therefore set aside, and the cause is remanded." (p. 382)

The next point which we make, if your Honors please, is that in admitting certain evidence the court below committed error and ruled contrary to the decision of this Court in the case of

Dwinnell v. United States, 186 Fed., 754.

The charge in the indictment was a conspiracy to bring Chinamen into the United States. It is our contention, assuming for the sake of argument that there was a conspiracy under the law, that as soon as the Chinamen reached the territory of the United States the purpose of the conspiracy was accomplished and the crime was at an end. The learned judge in the court below permitted, over the objection of defendants, a great mass of evidence to be introduced before the jury concerning the conduct of defendants Wong Chung and Wong Wing Sai (not a plaintiff in error), after the contrabands were within the United States. For instance, he permitted evidence that they purchased tickets for these Chinamen from San Bernardino to San Francisco. All these were subsequent to the completion of the alleged conspiracy and were therefore improper. I believe that comes directly within the authority of this court in the case of *Dwinnell*.

That was a prosecution for conspiracy to defraud the United States by suborning certain persons to com-

mit perjury in making entries under the Timber and Stone Act. Evidence was admitted of acts of the alleged perjurers committed subsequent to the time when they swore to and filed their statements and of a subsequent agreement with the defendant to file a relinquishment of their obligations. This Court held that since these matters occurred after the alleged conspiracy was consummated they were inadmissible in evidence, and reversed the judgment.

But, if your Honors please, we return to the main question in this case: In this day and generation, where we boast of our progress and of our humanity and laws, can officers of the government of the United States place their hand upon an indefensible citizen, one who is pursuing the even tenor of his way, and for their own nefarious purposes induce that man to consent to an apparent crime, none being intended, not for the purpose of ascertaining whether he is engaged in criminal traffic or not, but for the purpose of using him for all he is worth, in the language of the letter of Professor Sanford, to obtain from him information which he may have upon other collateral matters? Why, if your Honors please, if that doctrine shall be promulgated as law, if that is the law of the land, the rack, the knee crusher and the thumb screw sink into utter insignificance; while physically more barbarous, they are infinitely less subtle.

What was their intention? Here was a man who had never been within the clutches of the law, a man

whom they knew an indictment or even the faintest imputation of wrong-doing would be a greater source of suffering than if he were put upon the rack. They intended to make this man believe that he had committed a crime, to make this man believe that he was a criminal within the purview of the laws of the United States, and thereby force him under that stress of mind, to compel him under that leverage and that power, if he knew anything, to divulge it against someone else; and because they failed in that particular thing, they arrested him, indicted him and convicted him.

The learned judge below held, and so instructed the jury, that these things were no defense to the charge of conspiracy. His charge practically took the case away from the jury.

A reading of the record shows these things were all done under the supervision and at the direction of those high in authority in Washington. If those things, those devices, can be resorted to, then human liberty is not safe. Particularly, if your Honors please, does it appeal so strongly to that which we know about the Chinese character. One place here a Chinaman says: "When I said some danger, they said, 'No, we are the government!'" Now, that would appeal, as you all know, to a Chinaman. In his country, the controlling power is like that of the Centurion of old who stated: "And I say unto one man go, and he goeth; and unto another, come, and he cometh."

When the government officers said: "Go ahead, everything is all right," they believed that it was all right.

And now a special plea for the defendant Wong Yee. The extent of his yielding to the inducement of the government officials was to journey twice, upon their insistence and assurance that they as the government itself would protect him, to Ensenada, Mexico. Upon the latter of these journeys one of his eyes became affected from exposure and the old man eventually lost the sight of that eye. He knew then that he could no longer be of advantage in the business of the government agents. As he quaintly put it: "I have a bad eye and I will quit that thing; I no can attend to that business. After that I didn't have anything more to do with the matter" (p. 164). He lost the sight of an eye in the service of the government; they would now deprive him of his liberty. We cannot believe that this purpose may be accomplished through the medium of a court of justice.

If your Honors please, the learned judge below instructed the jury that these matters constituted no defense. If it is no defense, and if it is the law that officers high in authority for the purposes of state, if you please, for the purpose of ascertaining whether or nay those who have received the appointment of immigration officers are conducting their offices honestly and faithfully, if they can by their *ipse dixit* send out detectives, use the strong arm of the government of the United States to seize innocent people of an alien

race that bow in their country to the supremacy of the power of the law, take them six or seven hundred miles away, pay their expenses, pay their hotel bill, take them into the office of the government of the United States, and there induce them, *pro forma* at least, to agree to a violation of the laws of the United States without any intention on their part that the laws of the United States should be violated, and thereby make felons of them, then I say the law is marred, and we in these United States should not turn our heads away and shudder at the quick way in which in Africa they behead people suspected of crime, because in a different way we would debauch a man and cause him to become a criminal who would otherwise be a good, respectable and decent person.

We say that this is not right—that this is not law. The brief of the government cites many cases in support of its contention. The meaning and effect of these authorities should be considered by way of reply but rather than take the time now for that purpose we will, with your Honor's permission, print a reply brief together with this argument.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The opening pages of the brief of the district attorney are devoted to an attack upon the accuracy of the narrative contained in our opening brief. The sole basis of this attack is in the nature of a *reductio ad absurdum*; it is urged that if the facts had been as outlined by us there would have been a different verdict or a different sentence in the case. But we confess no surprise in the verdict; none in the sentence, and none in the attitude of the judge as disclosed when he pronounced his judgment. These all might have been otherwise if the learned jurist who presided at the trial had entertained the feeling of indignation which we sincerely believe is ordinarily prompted by a reading of the manner in which these Chinamen were made criminals. But the trial judge was disposed otherwise, whether temperamentally or from constitutional convictions, no one can say. What influences of life and training operated to mold and color his judgment we shall never know; but we do know that his opinions were honestly and conscientiously entertained, and with all respect we positively affirm that we believe he was in error. So there is no room for astonishment in reading of the action of the trial judge in view of his charge to the jury that the fact "that the government agents procured the defendants to commit the crime is not a valid de-

fense." And in view of that instruction there is no room for surprise in the verdict.

The district attorney proceeds, however, to ascribe the asserted inaccuracy of "The Story" to an undue reliance upon the testimony of the Chinese defendants and announces his desire

"to controvert such statement of facts, and to briefly state the facts as they would seem to be from an unbiased reading of the record, and as they undoubtedly appeared to the judge and jury before whom they were presented."

But the district attorney fails to appreciate that the outcome of this proceeding in error depends implicitly upon the propriety of the instruction to the jury concerning the law of entrapment wherein the court charged:

"In other words were you to find the facts to be fully as testified to by the defendants who took the stand, these facts would constitute no legal or valid defense in law to the charge embraced in this indictment." (Trans., p. 178.)

If, therefore, the facts as narrated by the defendants did, in the opinion of this Court, constitute a defense, prejudicial error has been committed. And notwithstanding the district attorney's assertion, made utterly without support in the record, that the testimony of these Chinese discloses that they entertain loose notions of the obligation of an oath, that testimony is the sole basis upon which the decision in

this Court is to be determined. So without further comment we may leave the district attorney's narrative of the facts of the case as immaterial. We cannot, however, forego the opportunity to point out the humorous quality implicit in the district attorney's assurance of the impartiality of his statement of the facts. The numerous references to the transcript in support of his narrative are with three exceptions (concerning perfunctory matters) at pages 1 to 133. *The defendants' case begins at page 134.*

It is plain that the instruction of the court that the evidence of the defendants constituted no defense was substantially a direction to find them guilty; there was no alternative. Let us then consider this fundamental issue both upon reason and in the light of the cases cited by both sides in support of their respective contentions.

The activity of government officials who participate in the commission of a crime for the purpose of arresting and convicting the criminal has given rise to a clearly defined distinction in the authorities. Crime is in itself naturally clandestine, and it is therefore necessary in order to detect the criminal in the act of wrong-doing that decoys be laid or even that government officers pretend to participate in the transaction. While there is some authority to the effect that in such a case a conviction will not be permitted, it seems that the weight of judicial decision is to the contrary. Among the latter are the numerous cases

in the federal courts where, for example, crimes against the postal laws have been committed in response to decoy letters. On the other hand, where there is no criminal activity which calls forth the effort to detect by means of decoy and where the conduct of the official goes farther than a mere inquiry to determine whether the suspect is ready and willing to break the law—where in fine the representative of the government approaches a person innocent of crime or criminal intention and by persistent effort and tempting promises undermines the integrity of his victim and ultimately procures him to commit a crime, the conduct of the official is abhorrent to the sense of decency and justice, and the government which has conferred the authority so viciously abused by the agent should not be and is not permitted to disavow the agency and to obtain a conviction. This is the radical distinction. Where one private individual induces another to commit a crime, this affords no defense to the criminal. This same theory underlies many decisions involving the entrapment of a suspected criminal where the detective does not disclose his official capacity and the suspect does not act under the assurance that the participation of the government's representative will afford security. But in the case at bar the jury, as we have pointed out, was instructed that the testimony of the defendants, even if believed by them, would not be a defense. The situation presented is (pursuing the testimony) that of

Chinamen innocent of criminal intent, whose leader is, without knowledge of the purpose of the journey, invited by a detective to visit Los Angeles and San Diego. Arriving there he is introduced to men who represent the government of the United States in their particular sphere of activity. Any casual student of the political history of China is at once impressed with the custom that the government official is the government itself—a custom of such long standing that it has become a tradition and is of course profoundly reflected in the intelligence and conscience of the Chinese race. Therefore, when Woo Wai evinced a disposition to reject the tempting bait which the makers of criminals held out to him, it is not surprising to find that the Chinaman was reassured by the declaration of the officer: "Oh, well, if we make no arrest, who can make arrest?" (Trans., p. 143.) And so the heredity and training of Wong Yee rendered him equally susceptible to the same powerful impression when to overcome his hesitancy about the business Conklin announced: "Well, he said, I the government. I protect you. No fraid you" (Trans., p. 155). Thus by dint of the constant prodding of the detective Roy in San Francisco, of the inspector Conklin, by correspondence, personal solicitation, gifts and simulated good will and affection for the children of his victim, the integrity of Woo Wai and his friends was dethroned. God knows it is difficult enough for the human conscience unaffected by such influences as

these and by ignorance borne of foreign nativity accurately to distinguish between the confines of right and wrong. Are these Chinamen to be branded as felons because they were not strong enough to withstand the attractive though nefarious partnership which the entire Department of Immigration held out to them? Will that branch of the executive function of the government known as the Department of "Justice" be permitted to disavow the conduct of another branch known as the Department of Commerce and Labor and to secure the conviction of men who, therefore innocent of wrong, were induced by the latter's initial suggestion and frank cooperation to offend against the law? Upon principle it is submitted that there can be but one answer to this query. Cases maintaining this contention and many going much further than is necessary in the cause at bar were cited in the opening brief. But in view of the government's assertion that there is a contrary line of authority which permits a conviction under the facts presented here, we shall now proceed to analyze the cases cited for the purpose of demonstrating that without exception they bear out the line of demarkation stated above between the inducement of a criminal act in order to detect one engaged in criminal activity and the making of a criminal out of an innocent man.

The first case cited by the government in this connection is

De Graff v. State, 103 Pac. (Okla.), 538.

There the defendant was suspected of violation of the liquor law and when the detective in the guise of a casual customer applied for the liquor it was ready for sale. He described the incident as follows:

"I went into the back room, and there I saw Mr. De Graff, the defendant. He asked me what he could do for me, and I told him I wanted a small bottle of beer. He opened an ice box and took out a black pint bottle of beer. It was labeled 'Adam's Special.' He pulled out the cork, and I drank the contents of the bottle." (p. 549)

Almost immediately following the extract quoted in the government's brief the Oklahoma court states the reasons underlying its decision:

"Everybody knows that more devices and subterfuges are resorted to in attempting to violate prohibitory liquor laws, and to evade punishment therefor, than in all other departments of criminal law combined. Hence the necessity for the greatest vigilance and energy on the part of the officers in securing their enforcement." (p. 550)

It is plain from the foregoing that De Graff was not made a criminal. He was suspected of being a violator of the law and upon a test the suspicion was found to be justified.

The next authority cited is from the same jurisdiction,

Moss v. State, 111 Pac., 950.

The excerpt from the opinion quoted in the government's brief itself discloses that it is a case of the same character. For example, the court there points out that the offense

"is one of a kind habitually committed and the solicitation merely furnished evidence of a course of conduct (citing cases). In many instances habitual and flagrant violations of the liquor laws can be detected by no other means. The officer or his agent may furnish the defendant in such cases the opportunity to sell, *but he does not furnish the defendant the liquor or the intent to sell*; and the sale to an officer is not more meritorious or less criminal than if made to some other person. We find nothing in the law or in public policy forbidding the detection of both the offense and the offender in this manner, and we have no criticism to expend upon a public officer who may find it necessary or expedient to adopt this means of discovering infractions of this law."

Next is

State v. Smith, 152 N. C., 798; 67 S. E., 508; and
State v. Hopkins, 154 N. C., 622; 70 S. E., 394.

In the former the court relied upon the Illinois case of *City of Evansville v. Myers*, where it was held:

"A driver of a beer wagon who sells beer in

violation of a city ordinance is liable to punishment, though the city furnished the money and employed the purchaser as a detective to discover violations of the ordinance, where no fraud or deceit was used in the purchase or any inducement offered than a willingness to buy."

The excerpt from the *Hopkins* case is in itself sufficient to show that the same principle was there involved.

"The methods adopted by the policeman to catch the defendant in the act of violating the law have been criticised; *but it must be remembered that the ways of 'blockaders' are devious and their trade is generally plied 'underground.'*"

The same is true of the quotation from

State v. Lucas, 94 Mo. App., 117.

The court there speaks of the conduct of detectives which "entrap the *law-breaking class* by gaining their confidence and practicing deceit upon them." And the conviction is upheld upon the ground that

"To discover and bring to justice *those who subtly, clandestinely and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable*, and when nothing more than the truth is elicited and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered."

The case next cited is

Davis v. State, 158 S. W. (Tex.), 288.

The defendant there testified in support of his plea that he had been induced to commit the crime that the county attorney "suggested, 'You are always asking "us for favors, and doing nothing for us,' and they " then went into a private office where the remainder " of the negotiations took place." (p. 290) The court repudiated the view of the trial judge that if the first suggestion proceeded from the government officer an offer to bribe him would not be an offense. This, however, is a far cry from the course of conduct of the government agents in the case at bar which culminated in the procurement of the overt act alleged. The attitude of the officer in the Texas case was in the nature of a decoy throwing open to the defendant the opportunity to commit a crime if he entertained a criminal purpose. It operated as a test of the honesty of his intentions and not as an influence creative of criminal desire. The situation in the Texas case is further distinguishable from that at bar because the act there in question was *malum in se*. The pertinency of this factor and also the scope and effect which should be accorded to the *Davis* case is clearly determined by the fact that a few months prior to that decision the same court, consisting of the same judges, announced in

Scott v. State, 153 S. W., 871,

the principles which are quoted at page 23 of the opening brief. The court held, in a prosecution for

violation of the liquor laws—*malum prohibitum*—as follows:

“The officers are not justified in inducing men to commit crime or in employing others to induce them to commit crime in order that prosecutions may be instituted. It is his duty as an officer, where he understands that parties are engaged in crime, to use every effort legitimate and permissible by law to detect and ferret out crimes and bring criminals to trial and justice. But this does not justify him in employing parties to go out and induce the citizens to commit crime that prosecutions may be instituted and carried on.”

The authority of this decision has never been questioned or limited in any way.

There follows in the government's brief a discussion of the federal decisions upon the subject of entrapment where violations of the postal laws or thefts from the mails were involved. It was held—in line with the distinction for which we have always contended—that where a person is suspected of sending unlawful matter through the mails and does so in response to a decoy letter, there is no defense. The same conclusion is reached where one suspected of stealing from the mails commits this act with respect to a letter sent by government agents to detect the offender. In these cases the criminal purpose exists prior to the activity of the government officials, which serves solely to present the opportunity to the criminal and thereby detect him. The leading case is

Grimm v. U. S., 156 U. S., 604.

There the difference between detecting and making a criminal is clearly pointed out by the court. The statement is of more than persuasive force in the case at bar. In sustaining the conviction it was held:

“It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business.”

The district attorney professes to believe (brief, p. 21) that the Supreme Court did not intend to say what its language necessarily means. Counsel's view is apparently the result of a failure to perceive the basic distinction between conduct of the government in offering the opportunity to the suspect to commit the crime in which he is believed to traffic and in inspiring the original criminal purpose in the mind of an innocent man. In none of the other cases in the United States Supreme Court cited by the district attorney was there even a suggestion by the government official which procured the criminal act. A passive medium was presented to the suspect upon which his guilty mind seized and was thereby detected.

We may leave the federal citations with a word concerning the case of

United States v. Morgan, 181 Fed., 587.

From the opinion it appears that the defendant was engaged in selling water under a false brand in New

York City and was therefore amenable only to the state authorities. An order for some water was sent by a government agent from Newark, N. J., and in response the defendant made an interstate shipment thus offending against a federal law and was held guilty. In this case as in all others where a conviction was permitted the criminal activity long antedated the participation of the government official—a criminal was not made.

But the opinion of the district judge is of no consequence whatever because of the treatment which the case received upon writ of error in the Supreme Court of the United States.

U. S. v. Morgan, 222 U. S., 274.

The trial judge had granted the motion in arrest of judgment on the ground that although the conduct of the government agent did not deprive the defendant's act of criminal character it made it necessary under the statute that defendant be given notice and an opportunity to be heard by the Department of Agriculture. This had been wanting and the conviction was set aside. However, the statement of the case by the Supreme Court discloses that the government officer sought to purchase the water not from the defendant but from a druggist in Newark:

"In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not

having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

"The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910, when they were found guilty of shipping misbranded goods in interstate commerce." (p. 275)

The question of entrapment was not considered. The defendant resisted the writ of error on other grounds which, however, were overruled and the judgment in his favor was reversed. Therefore the meager language of the district judge upon which the district attorney relies not only does not support his contention but is *brutum fulmen*.

The cases cited by the government which hold that where the defendant is induced by another private individual to commit a crime there is no defense, are so plainly inapplicable that they merit no further consideration.

The extract quoted from the case of

O'Halloran v. State, 31 Ga., 206,

discloses that it falls definitely within the category of detection of a criminal. It is said not to be wrong to lay a trap "*to detect a culprit*" and speaks of the plan "*to catch the offender*."

The next case cited is

People v. Mills, 178 N. Y., 274.

There the unlawful purpose originated with the defendant who procured one of his associates to approach the public prosecutor with the view of buying him off and thereafter treated personally with a detective as the representative of the prosecutor. The district attorney says in his brief:

"The above case would seem to be particularly applicable to an extreme case of instigation to commit crime by federal officers charged with the duty to detect and suppress such crime, as well as to the case at bar." (p. 31)

To demonstrate counsel's error it is only necessary to quote from the report of the decision:

"He (the defendant) discussed Garvan and the latter's attitude to the case, and asked Meloy if he would not make an engagement with Garvan so that the defendant could see and have a talk with him and see if the prosecutions could not be stopped, and there was some conversation about the money which had been paid for counsel, and that if it were given to Garvan it would accomplish greater results. The defendant finally said: 'I will not give Hart any money or any lawyer. . . . I know the head of this thing and I am going to give what money I give to Garvan. . . . When he said he wanted to get in contact, I asked him if he knew what he was doing, what he was about; he said he thought he did. Then I said the same general remark—be careful.' " (p. 277)

This conversation was between the defendant and Meloy, his associate, who had no connection with the government officers.

Then quoting the testimony of the detective:

"I asked him then, 'Well, what is it you want us to do?' He says, 'Well, these indictments that have been found against Dr. Flower you can withdraw them and misplace them, lose them or dispose of them in some way or Mr. Garvan could go into court and permit him to go into court on a demurrer and have the indictments quashed.' I told (him) that I would see Mr. Garvan and submit this to him and let him know." (pp. 278-9)

That the issue there was essentially different from that at bar is further apparent from the following extract from one of the two dissenting opinions filed by members of the New York court who believed that a conviction should not be had even under the facts of that case:

"The argument of the learned court below in support of the conviction rests upon a single proposition, which I quote from the opinion. 'Having proposed the scheme and set in motion the forces by which the indictments were actually removed from the files of the court and delivered to him, every act from the inception of the scheme to its final consummation by the delivery of the indictments was the act of the defendant, no matter by whom it was performed, and it constituted him a principal in the transaction.' " (pp. 301-2)

Among other things the majority opinion announces

the principle that the conduct of the officers of the state government was not the conduct of the state itself, thereby distinguishing the case from those of larceny and burglary where the consent of the person stolen from is held to deprive the act of criminal taint. Upon the same ground the brief of the government contends against the pertinency of this line of authority to the facts at bar. From the argument which we have made here it is plain that we need not and do not rely upon cases of crimes involving the taking of property and that there is ample authority in our support which is not open to this objection. But a few ideas upon this subject are pertinent.

The point of distinction just referred to is not an accurate one. In the first place, in cases of larceny and burglary the defendant has frequently been held guilty where the activity of the owner of the property and the detectives have been restricted to pretended cooperation after discovery of the defendant's purpose to commit the crime. But where the government agents have had the unlawful purpose suggested to the defendant and have persuaded him into the act, no conviction has been sustained. The element of consent is present in both cases. This, then, is not material. But the distinguishing feature is the policy of the law which while tolerating all reasonable means to detect a criminal will not permit the government officers to make one. That same public policy should preclude a conviction in the case at bar.

But it is worthy of note that there is another factor present in the case at bar which serves to distinguish it from the *Mills* case and the conclusion—there stated—that the State of New York was not bound by the acts of the public prosecutor. The government here wanted to get a hold on Woo Wai. This was a governmental purpose which did not alone concern the making of a criminal. For there was the moving governmental motive to obtain information which the government believed could be elicited from this Chinaman. The matter thus concerned one of its administrative departments. To induce Woo Wai apparently to break the law was a means to a governmental end—a link in the devious chain which the government saw fit, in its omniscience, to forge as a proper method of checking up the efficiency and integrity of the Immigration Department. The law which the United States procured Woo Wai to break was a mere administrative regulation. No criminality was inherent in the act itself; there was no *malum in se*. The theories underlying the exclusion of one class of Chinese and the admission of another may be ethically unsound and unjust. Nevertheless the United States government has determined that it shall be so and that determination is final. But it has designated certain men whose sole office is to maintain this arbitrary regulation, to prevent violations and to apprehend violators. These men rank from the cabinet officer to the inspector. Their conduct in the premises was, regardless

of the motive that impelled it, an administration of the law of the United States and the convictions which induced their action were conclusive in the matter. When the government seeks to obtain a conviction upon these facts should it not be held to be concluded by the conduct of its agents? Should it be permitted to disavow the activity of its officials in making criminals of these Chinese and nevertheless obtain a conviction upon the basis of the testimony of these same officials who have gone upon the witness stand not as conspirators—the district attorney has vehemently repudiated this suggestion—but as inspectors still pursuing their employment as such in an effort to make felons of the men whose apparent offense they have already induced?

We have postponed until this time a consideration of the case

Commonwealth v. Wasson, 42 Pa. Sup. Ct. Rep., 38,

quoted in the government's brief, because it serves to introduce another line of argument. While the extract from the opinion quoted by the district attorney seems to support his contention, it will be found upon a reference to the report of this case that the defendant was one of the councilmen of Pittsburgh who were suspected of being engaged in various forms of graft and the activity of the detectives was inspired by an organ-

ization whose purpose was to promote clean government.

“According to a fair and legitimate interpretation of the commonwealth’s testimony, the general purpose for which Wilson was employed was the investigation of the previous passage of ordinances and measures through councils by bribery of councilmen, of which there had been rumors, particularly the ordinances designating six banks as depositories of city moneys and the obtaining of evidence of such corrupt practices on the part of councilmen.” (p. 46)

It is clear, therefore, that this case falls within the category of those where the activity of the detectives is directed to the end of detection in crime of persons suspected to be engaged therein. It is further to be noted that the detectives were not the agents of the government but were in the employ of a private organization.

But by far the most interesting feature of this decision lies in a part of the opinion of the court which the district attorney has seen fit to omit from his quotation. At page 25 of the government’s brief a sentence is quoted beginning with the words “Without declaring, etc.,” as if it appeared in the opinion in immediate sequence after that ending with the words “by the detective.” Upon consulting the opinion it will be found that between these two sentences there are over three pages of illuminating discussion. If these had been included the real meaning of this au-

thority and its weight against the contention of the government would have been clear. After an analysis of many of the leading decisions the court there held:

“Again, in considering the question of public policy the clear distinction, founded on principle as well as authority, is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare rather than individuals.” (p. 57)

The court there clearly has in mind the principle that public policy does not permit the making of the criminal by the representatives of the government. What purpose the United States officials hoped to accomplish by using their hold on Woo Wai to force from him the information they believed him to possess will never be known. What personal enmities were to be gratified will never be ascertained. For when they got their hold on him either they found that he knew nothing or else he refused to “come through.” And this prosecution was apparently the penalty which he has paid, either for his ignorance or for his recalcitrance.

But the outcome of the plot was far different than the purpose that impelled it. There was apparently no original intention to make a criminal of Woo Wai. The government officers were not interested in him.

He and his friends were to be the pawns in their game and the plan was to induce him into an apparent breach of the law and then by threats of prosecution to obtain the desired information. It is respectfully submitted that no crime was committed and that under the facts no conviction can be maintained.

Denis & Loewenthal; C. H. Sooy;
J. C. Campbell; David L. Levy; and
J. C. Campbell, Weaver, Shelton & Levy,
Attorneys for Defendants.

